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In The

Supreme Court of the United States

MICHAEL O. LEWIS, As Personal Representative of the Estate of N.G. Lewis, Deceased,

Petitioner,

v.

LOCAL 382, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL-CIO),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the exception to preemption carved out by Congress under 29 U.S.C. § 413 applies to a state court action by a labor union member against his Union for willful and wanton violation of a state Right to Work Act?

2. Where a member of a labor union recovers a state court judgment against his Union for a willful violation of the State Right to Work Act for conduct proscribed therein as illegal, tortious, and criminal, can the Federal Preemption Doctrine under the Supremacy Clause of United States Constitution, Labor Management Relations Act (LMRA), or Employment Retirement Income Security Act (ERISA) be invoked to invalidate the Right to Work Act, sanction the violation thereof, and absolve the Union from liability?

3. Whether a Remand Order by a federal court to the state court from which it was removed is appealable and precludes the state court from reconsidering the preemption issue where the Order does not specify lack of subject matter jurisdiction or a defect in the removal procedure as a ground for remand?

DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner Michael O. Lewis is the Personal Representative of the Estate of N.G. Lewis, deceased, and was substituted as a party plaintiff after the death of his father, N.G. Lewis, who originally brought this action against respondent and several individuals who were thereafter eliminated as parties.

The only respondent in this case is Local 382, International Brotherhood of Electrical Workers (AFL-CIO). Its parent organization is International Brotherhood of Electrical Workers.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael O. Lewis, as Personal Representative of the Estate of N. G. Lewis, deceased, respectfully prays for a Writ of Certiorari to review the final decision and judgment of the South Carolina Supreme Court affirming the opinion and judgment of the South Carolina Court of Appeals (intermediate appellate court), which reversed the judgment of the trial court entered on a jury verdict in favor of petitioner.

OPINIONS BELOW

The decision and opinion of the South Carolina Supreme Court (App. 1-10) was filed on July 12, 1999. Petition for Rehearing (App. 58-73) was filed on July 27, 1999, and denied by Order of the Court dated August 17, 1999 (App. 52). The opinion is reported in ____S.C. ____, 518 S.E.2d 583 (S.C. 1999).

The opinion of the South Carolina Court of Appeals (App. 12-44) (intermediate appellate court), was filed on October 14, 1996. A petition for rehearing and rehearing en banc was filed and denied by Orders of the Court dated February 21, 1997 (App. 54-56). A Petition for Writ of Certiorari to review the decision of the Court of Appeals was filed in the South Carolina Supreme Court and granted by Order dated April 9, 1998 (App. 11). The opinion of the Court of Appeals is reported in 324 S.C. 412, 481 S.E.2d 135 (S.C. App. 1996).

The unreported order of the U. S. District Judge remanding the case to the state trial court from which it was removed was issued on August 9, 1989. (App. 50-51).

The unreported order of the trial judge denying the respondent's post trial motions and directing entry of judgment for petitioner was issued April 10, 1995 (App. 46-49). Judgment was entered on April 14, 1995 (App. 45) on the jury verdict returned on June 18, 1993 (App. 75-76).

JURISDICTION

The opinion and judgment of the South Carolina Supreme Court was filed on July 12, 1999 (App. 1-10), and Petition for Rehearing was denied on August 17, 1999 (App. 52). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set forth in Appendix (beginning at App. 98).

U.S. Const., art. VI

U.S. Const., amend. X

28 U.S.C. § 195 (LMRA)

28 U.S.C. § 1257(a)

28 U.S.C. § 1447(c)

28 U.S.C. § 1447(d)

28 U.S.C § 2403(b)

28 U.S.C. § 411(a)(5)

29 U.S.C. § 413 – Labor Management Reporting and Disclosure Act (LMRDA)

29 U.S.C. § 1144(a) – Employee Retirement Income Security Act (ERISA)

South Carolina Right to Work Act

S.C. Code Ann. § 41-7-70 (1976)

S.C. Code Ann. § 41-7-80 (1976)

S.C. Code Ann. § 41-7-90 (1976)

STATEMENT UNDER RULE 29.4(c)

Since the proceeding draws into question the constitutionality and validity of the South Carolina Right to Work Act, Chapter 7, South Carolina Code Ann. §§ 41-7-70, 41-7-80, 41-7-90, a statute of the State of South Carolina affecting the public interest, and neither the State of South Carolina nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable.

STATEMENT OF CASE

A. Gravamen of Claim

N.G. Lewis, an electrician, who for 38 years was a member of Local 382, International Brotherhood of Electrical Workers (AFL-CIO), (Union), brought this state court tort action in the state trial court against his Union for willful and wanton violations of the South Carolina Right to Work Act. This Act proscribes as illegal, tortious, and criminal the conduct of any person who by the use of force, intimidation, violence, threats or violent and insulting language directed against a Union member or his family, interferes or attempts to interfere with the exercise of the Union member's right to work or enter or leave his place of employment.

Lewis' complaint alleged that the proscribed tortious conduct of the Union resulted in damages to him measured

by pain and suffering, extreme emotional distress, nervousness, worry, loss of sleep and other emotional ills, loss of expected retirement benefits and the value of monies paid to the Union over the years he was a member, and prayed for judgment for actual and punitive damages.

As more fully discussed, infra, the case was removed by the Union to the federal court, which in turn remanded the case to the state court for trial. The case was tried as a state-law tort claim against the Union for employing the use of force, intimidation, and threats to interfere or attempt to interfere with its member's right to work in violation of the South Carolina Right to Work Act, which proscribes such conduct as illegal, tortious, and criminal.

The jury returned a verdict in Lewis' favor for actual and punitive damages. After denial of post trial motions, the Union appealed to the South Carolina Court of Appeals.

B. Pertinent Facts Unchallenged on Appeal

On appeal, the pertinent facts as found by the verdict of the jury, and unchallenged on appeal, are that the Union used force, intimidation, and threats to interfere, or attempt to interfere, with the exercise of Lewis' non-negotiable right to work and engage in lawful employment.

The Union relied for reversal solely on the ground that the state Right to Work action was preempted by LMRA and ERISA because its conduct was committed in the course of disciplining its member for violation of union internal rules, and further, that the federal remand order was not of preclusive effect, even though the remand order did not specify either lack of subject matter jurisdiction or defects in procedure as a ground for remand.

C. Proceedings in the United States District Court

Federal Issue Raised: The Union raised the federal issue of preemption in its Notice of Removal to the U.S. District Court, in which it contended that Lewis' action was preempted by ERISA and LMRA, and in effect, should be dismissed for lack of subject matter jurisdiction (App. 91-94). The time for answering the complaint having expired under state law, Lewis filed an Entry of Default along with a Motion to Remand (App. 79-90). By the Motion to Remand and supporting memorandum, Lewis opposed the removal and the Union's contention that his action was preempted by federal law and in support thereof, Lewis relied on controlling federal and state statutes and applicable decisions of this Court and of the South Carolina Supreme Court, including Layne v. International Brotherhood of Electrical Workers, (AFL-CIO), Local 382, 271 S.C. 346, 247 S.E.2d 346 (1978), which cited 29 U.S.C. § 413, for rejecting the preemption doctrine as a defense to Plaintiff's action for violation of the South Carolina Right to Work Act.

At the hearing before the U.S. District Judge, and after remand, in the subsequent proceedings in the state trial court, South Carolina Court of Appeals, and the South Carolina Supreme Court, the Union contended that under ERISA and LMRA, Lewis' action was preempted by the Union Constitution and by-laws. The Union argued that it had a contractual liberty under its constitution to enforce its internal disciplinary rules for violation of its by-laws, even though there exists no provision in the Union Constitution or by-laws which grants the Union the liberty to use force, intimidation, violence, or threats to enforce its disciplinary rules.

The only contractual liberty granted the Union to penalize a member for violation of its rules is limited to assessment of fines, suspension, or expulsion, as appears in

the Union Constitution at Article XXVII Sec. 1, (17) and (19), which read as follows:

> Article XXVII
>
> Sec. 1. Any member may be penalized for committing any one or more of the following offenses:
>
> x x x
>
> (17) Working for any individual or company declared in difficulty with a L.U. or the I.B.E.W. in accordance with this Constitution.
>
> x x x
>
> (19) ... Any member convicted of any one or more of the above-named offenses may be *assessed* or *suspended*, or both, or *expelled*. (emphasis added)

The U.S. District Judge, on assuming and exercising subject matter jurisdiction to pass on these issues, and considering the authorities and statutes presented in the written and oral argument of counsel for the respective parties, first granted the Union's motion to set aside the entry of default. Then agreeing with Lewis' contention, he decided the preemption issue, concluding that the Right to Work Act was not preempted by federal law. This left open only the pendent or supplemental state law issue of whether the Union violated the state Right to Work Act and if so, the damages flowing therefrom. As a matter of comity and in accordance with the applicable federal authorities, he remanded the case to the state court from which it was removed. Accordingly, the Order of Remand did not specify

that the case was remanded for lack of subject matter jurisdiction or defect in procedure.

Before the case came on for trial in the state court, N.G. Lewis died. Michael O. Lewis was appointed administrator of the Estate of N.G. Lewis, deceased, and substituted as party plaintiff.

D. Proceedings in the State Trial Court

The case came on for trial before the state circuit judge and a jury as an action for willful and wanton violation of the South Carolina Right to Work Act by the use of force, intimidation, or threats to interfere or attempt to interfere with Lewis' right to work in lawful employment. Prior to the commencement of the trial, and after the close of Lewis' case in chief, notwithstanding the ruling of the U.S. District Court, the Union again raised the issue of preemption by moving to dismiss Lewis' action for lack of subject matter jurisdiction on the ground that it was preempted by ERISA and LMRA. After hearing arguments from respective counsel on this issue, the trial judge, without ruling on the motion, proceeded with the trial. At the close of the evidence, the trial judge charged the jury and submitted the case to the jury for its determination.

The jury resolved Lewis' claims without requiring construction of the Union Constitution and returned a verdict in his favor for actual and punitive damages against the Union only, eliminating the remaining defendants as parties.

Although the Union did not move for a directed verdict at the close of the evidence, it made a post-trial motion for judgment notwithstanding the verdict, on the ground that Lewis' action was preempted by ERISA and LMRA. The Union also moved for remittitur, new trial absolute, new trial *nisi*, and reduction of punitive damages.

The trial judge overruled the Union's motions, holding the evidence supported the verdict that the Union improperly used force to affect the work choice of a South

Carolina citizen, and accordingly directed entry of judgment against the Union in the amounts awarded by the jury (App. 45, 75-76). The trial judge also denied Lewis' petition for allowance of attorneys' fees.

E. Proceedings in the South Carolina Court of Appeals (intermediate appellate court)

The Union appealed to the South Carolina Court of Appeals, an intermediate appellate court, seeking reversal of the trial court judgment on the issue of preemption. Lewis also appealed from the denial of his petition for allowance of attorneys' fees.

The Union, however, in seeking reversal, did not challenge the facts found by the jury, that the Union, in violation of the South Carolina Right to Work Act, used force, intimidation, and threats to interfere or attempt to interfere with the exercise of Lewis' right to work and enter or leave his place of employment and the damages resulting therefrom.

Other than the preclusive effect of the remand order, the only issue presented by the Union's appeal was whether Lewis' claim under the Right to Work Act was preempted by federal law.

In seeking reversal and dismissal of Lewis' action for lack of subject matter jurisdiction, the Union asserted, as it did in the United States District Court proceedings, without evidentiary support, that Lewis claimed he had a property right or vested interest in pension benefits and was deprived of such property rights or vested interest in the benefits provided by the Union Constitution. This assertion is not supported by the evidence and is contrary to the facts as found by the jury, unchallenged on appeal.

The Union also contended that its violation of the Right to Work Act did not preclude the Union from enforcing its internal disciplinary rules upon its members by

the use of force, when in fact there is no disciplinary rule in the Union Constitution which authorizes or suggests that the Union is authorized to apply force or engage in the conduct proscribed by the Right to Work Act in enforcing the Union's disciplinary rules.

Also, the Union contended that the prior South Carolina Supreme Court decision of Layne v. International Brotherhood of Electrical Workers, Local 382, 271 S.C. 346, 247 S.E.2d 346 (1978), which applied 29 U.S.C. § 413 in rejecting federal preemption, was distinguishable from the case at bar and therefore not controlling. However, the record clearly shows, as stated by Judge Cureton in his dissent, "Layne involved an extraordinarily similar factual situation." Lewis, 324 S.C. 412, 438, 481 S.E.2d 135, 149 (S.C. App. 1996).

On appeal, the Court of Appeals, with one judge dissenting, reversed the judgment of the trial court awarding damages to Lewis and dismissed as moot Lewis' claim for the allowance of attorneys' fees.

In reaching its decision that Lewis' action was preempted, it appears that the majority based its decision on the Union's conclusory assertions, without evidentiary support, and contrary to the facts as found by the jury, and unchallenged on appeal, that reference in Lewis' action to the expectation of retirement benefits, along with pain, suffering, humiliation, depression, and other emotional ills as a measure of damages implicated the Pension Benefit Plan of the Union Constitution and its by-laws under LMRA. The Court then reasoned that as a consequence thereof, the Right to Work Act was dependent for analysis and interpretation on the Union Constitution and was preempted thereby; and that pursuant thereto, the Union was granted the contractual liberty to violate the state Right to Work Act by the use of force, violence, intimidation, and threats directed against Lewis and his family to interfere or attempt to interfere with his right to work and free choice of employment.

In so reasoning, the Court rejected Lewis' contentions (1) that Congress carved out an exception to preemption by the enactment of 29 U.S.C. § 413, applicable to this action; (2) that the Right to Work Act touches interests rooted in deep local feelings and responsibility for the welfare of its citizens which Congress did not intend to supplant; (3) that reference in Lewis' action to the expectancy of retirement benefits did not substantially "relate to" ERISA or LMRA, nor was it inextricably intertwined with the Union Constitution, and at most, remotely, tenuously, or peripherally affected the federal statutes and Union Constitution; (4) that neither ERISA nor LMRA grants a Union the liberty of violating state laws affecting public interest by acting under its Constitution, as alleged, or even under the guise of its Constitution; (5) that the merits of the preemption issue were ruled on by the U.S. District Judge and had preclusive effect because the remand was not predicated on lack of subject matter jurisdiction or defect in removal procedure and thus reviewable or appealable; (6) that the remedies provided in the Right to Work Act did not interfere or conflict with the operation or administration of ERISA; (7) that the Right to Work Act does not depend for resolution upon interpretation of the Union Constitution; and (8) that Lewis did not claim the Union's conduct was motivated to avoid payment of retirement benefits or for any reason other than to affect Lewis' work choice by the use of force in accordance with the findings of the jury and unchallenged on appeal.

One judge dissented from the rationale and conclusion of the majority in a separate opinion, concluding that the judgment of the state trial court should be affirmed, Lewis, 481 S.E.2d 135, 145-150 (S.C. App. 1996).

Lewis filed a petition for rehearing and rehearing *en banc,* both of which were denied by Orders dated February 21, 1997 (App. 54-56).

Thereafter, Lewis petitioned the South Carolina Supreme Court for a Writ of Certiorari to the South Carolina

Court of Appeals, which was granted by Order dated April 9, 1998 (App. 11).

F. Proceedings in the South Carolina Supreme Court

On review, the South Carolina Supreme Court affirmed in result the majority decision of the Court of Appeals, but vacated a portion of the Court of Appeals' opinion.

The South Carolina Supreme Court interpreted the Court of Appeals' opinion as holding that Lewis failed to state a claim under the Right to Work Act, but "[g]iven its holding that Lewis' claim was preempted, it was unnecessary for the Court of Appeals to address this issue. Accordingly, we vacate the Court of Appeals' opinion holding Lewis failed to state a claim under the Right-To-Work Act." Lewis, ____ S.C. ____, 518 S.E.2d 583, 587-588. (S.C. 1999).

In vacating this portion of the Court of Appeals' holding, the South Carolina Supreme Court eliminated consideration of the Right to Work Act in balancing federal-state interests.

Thus, relying on the conclusory assertion of the Union that its Constitution provides authority for the Union to engage in the conduct proscribed by the Right to Work Act to enforce its disciplinary rules, the South Carolina Supreme Court invoked the Union Constitution, and in turn LMRA and ERISA as the basis for applying the preemption doctrine, notwithstanding that contrary to the assertion of the Union, the Union Constitution does not contain any provision authorizing the proscribed conduct to enforce its internal rules.

Moreover, the record is void of any evidence that the Right to Work Act is in conflict or interferes with the administration or operation of ERISA, or that the Right to Work Act is dependent for analysis on the Union

Constitution or is inextricably intertwined therewith. Clearly, contrary to the Union's contention, reference to the Union Constitution is not necessary to ascertain whether the Union, engaging in conduct proscribed as illegal, tortious and criminal by state law, acted properly in interfering or attempting to interfere with Lewis' choice of lawful employment.

In effect, if the decision of the South Carolina Supreme Court is permitted to stand, it would invalidate the Right to Work Act, sanction willful and wanton conduct in violation of the Right to Work Act, and grant the Union immunity from liability for conduct proscribed as illegal, tortious, and criminal by the state Act.

It is noted in the "Conclusion" of the South Carolina Supreme Court opinion "that Lewis is essentially seeking to recover his pension benefits, albeit under the guise of a Right-to-Work claim." This conclusion is not correct, and is not supported by the evidence of record, by the ruling of the U.S. District Judge, the facts found by the jury, and by the trial judge on post trial motions, and unchallenged on appeal.

Lewis filed a Petition for Rehearing which was denied by Order of the South Carolina Supreme Court, dated August 17, 1999, and he now petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. Exception to Preemption Carved out by Congress

The decision of the South Carolina Supreme Court is not in accordance with the applicable decisions of this Court holding that the preemption doctrine does not apply under federal law where Congress has carved out an exception to the doctrine. Vaca v. Sipes, 386 U.S. 171, 179 (1967).

Congress carved out an exception to preemption by enactment of 29 U.S.C. § 413 applicable to a remedy of a union member against his union under state law before any

court or tribunal, including a state court. This exception to preemption was applied in a prior decision of the South Carolina Supreme Court, factually similar to the instant case to reject the preemption defense asserted therein: Layne v. International Brotherhood of Electrical Workers (AFL-CIO), Local 382, 271 S.C. 346, 351-354, 247 S.E.2d 346, 349-350 (1978).

Notwithstanding, the South Carolina Supreme Court held that the doctrine does not apply here. It reasoned: "However, Section 413 of the LMRDA limits its application to that subchapter of LMRDA". Then, referring to footnote 10 in its opinion, the Court continued: "The subchapter of the LMRDA in question, § 411 (a) (5) deals with due process measures a union member must be afforded prior to being disciplined. As we read Section 413, it was intended to permit union members the procedural due process afforded by state law if it was greater than that permitted by Section 411." Lewis, ___ S.C. ____, 518 S.E.2d 583, 586, n.10 (S.C. 1999).

In rejecting the application of §413 as an exception to preemption, the South Carolina Supreme Court's decision also is in direct conflict with the rationale articulated by Justice White in Amalgamated Ass'n. of St. E. R. & M.C. Emp. v. Lockridge, 403 U.S. 274, 317-322 (1971), which applies with equal force to the instant case.

In discussing the application of 29 U.S.C. § 413, Justice White stated:

> During the 1950's there came to light various patterns of union abuse of power, and in the Labor-Management Reporting and Disclosure Act of 1959... Congress acted to correct these evils by directly addressing itself to some aspects of union-member affairs. The LMRDA provides a "bill of rights," which gives union members the right to participate in union affairs, to speak freely,

and to be protected from arbitrary discipline...

x x x

... Congress also provided in Title I, the "bill of rights":

"Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." § 103, 73 Stat. 523, 29 U.S.C. § 413. *Id.* at 321-322.

Beyond any doubt whatever, although Congress directly imposed some far reaching *federal* prohibitions on union conduct, it specifically denied any preemption of rights or remedies created by either state law or union constitutions and bylaws. Thus, as to union-member relations, any parallel rights created by the States, either directly or indirectly through enforcement of union constitutions or bylaws, were to stand at full strength. Congress backed up this power by requiring unions to make available to members the constitution and bylaws of the union, as well as financial information (citation omitted) *Id.* at 323.

See also Fulton Lodge No. 2 of the International Ass'n. of Machinists & Aerospace Workers, AFL-CIO, v. Nix, 415 F.2d 212, 215-216, nn.6-7 (1969), referring to preservation of remedies which a union member may have under state law pursuant to 29 U.S.C § 413.

It is significant to note that the provisions of the South Carolina Right to Work Act fall within the powers traditionally reserved to the states. U.S. Const., amend. X.

II. Preemption doctrine is not applicable to grant parties to a labor agreement the liberty to contract for what is illegal under state law.

The decision of the South Carolina Supreme Court is in direct conflict with the holding by this Court that federal law does not grant the parties to a labor agreement the liberty to contract for what is illegal under state law. To do so would be inconsistent with congressional intent under federal law to preempt state rules that proscribe conduct, or establish rights and obligations, independent of labor agreement. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

Clearly, the use of force, intimidation, violence, or threats to interfere or attempt to interfere with a union member's free choice of gainful employment is not only illegal and tortious but also criminal, under the South Carolina Right to Work Act, which in plain language is so clear and unambiguous that it is independent of, and needs no interpretation from the Union Constitution and is not inextricably intertwined with the Union Constitution. Additionally, the rights and remedies granted under the Right to Work Act are non-negotiable and cannot be waived by agreement. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 701-705 (1945), Livadas v. Bradshaw, 512 U.S. 107, 122 (1994).

Notwithstanding this Court's ruling in Allis-Chalmers Corp. v. Lueck, supra, that a Union cannot contract to violate state law, whether or not the Union Constitution grants it the liberty to do so, the South Carolina Supreme Court ruled directly to the contrary, holding that the South Carolina Right to Work Act was preempted by the Union Constitution.

The decision of the S.C. Supreme Court, if permitted to stand, would open the door to Union control of employment by the use of unlawful, unreasonable, and insidious conduct to enforce its internal disciplinary rules, and thus, invalidate the enforcement of the remedial provisions of state right to work acts and sanction illegal, tortious, and criminal conduct.

III. State law litigation pursuant to a remedy under a Right to Work Act is not preempted under federal law by mere reference to a labor union constitution.

The decision of the South Carolina Supreme Court is not in accordance with the holding by this Court that the mere reference in a state law claim, as here, to the expectation of retirement benefits provided in a labor agreement (union constitution) as a measure of damages does not preempt the state law claim. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, n.12 (1988). *Accord.* Livadas, 512 U.S. 107, 114.

Also, as more recently stated by Justice Souter in Livadas v. Bradshaw, 512 U.S. 107, 122 (1994):

> In Lueck and in Lingle ... we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law... the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished, see Lingle, supra, ... ("A collective-bargaining agreement may, of course, contain information such as rate of pay ... that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled.")

Contrary to Lingle and Livadas, the South Carolina Supreme Court relied on the reference in Lewis' action to the expectation of retirement benefits merely as a measure of damages to conclude erroneously that the union constitution was implicated under ERISA and LMRA to preempt Lewis' nonnegotiable right to work under the South Carolina Right to Work Act, without evidentiary support that the Right to Work Act interfered or conflicted with the operation and administration of the pension plan or was dependent on the Union Constitution for interpretation or was inextricably intertwined therewith.

IV. State law remedies under Right to Work Act are not preempted where they are merely of remote, tenuous, or peripheral concern of ERISA or LMRA, or touch state interests deeply rooted in local policy and responsibility.

The decision of the South Carolina Supreme Court is not in accordance with the applicable principles enunciated by this Court in Vaca v. Sipes, 386 U.S. 171, 180 (1967) that hold state remedies are not preempted:

> [w]here the activity regulated was a merely peripheral concern of the Labor Management Relations Act ... (or) touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act (citations omitted).

In addition to cases cited in Sipes, see also Belknap, Inc. v. Hale, 463 U.S. 491 (1983) (state law action of compelling state interest held not preempted even though conduct complained of is an unfair labor practice); United Construction Workers v. Laburnam Const. Corp, 347 U.S.

656 (1954) (action based upon threats and intimidation to force contractors to discontinue work held not preempted); DeBuono v. N.Y.S.A.-ILA Medical and Clinical Services, 520 U.S. 806, (1997), New York State Conference of Blue Cross & Blue Shield Plan v. Travelers Insurance Co., 514 U.S. 645 (1995) (ERISA's "relate to" language does not modify the starting presumption that Congress does not intend to supplant state law in a field that has been traditionally occupied by the states and the "relate to" language should be narrowly and not expansively, literally, or broadly construed); and Farmer v. United Brotherhood of C. & J. of America, Local 25, 430 U.S. 290 (1977) (Action by Union member against Union for threats and intimidation held not preempted by internal union policies under federal law). Also see prior South Carolina Supreme Court decisions: Kimbrell v. Jolog Sportsware, Inc., 239 S.C. 415, 123 S.E.2d 524 (1962) (action for violation of the South Carolina Payment of Wages Act for improper withholding of wages not preempted); and Layne v. International Brotherhood of Electrical Workers (AFL-CIO), Local 382, 271 S.C. 346, 247 S.E.2d 346 (1978) (South Carolina Right to Work Act not preempted by Union Constitution, citing 29 U.S.C. § 413).

Notwithstanding the decisions of this Court and the prior South Carolina decisions, and considering the Right to Work Act touches interests rooted in deep local feelings and responsibility and falls within the 29 U.S.C. § 413 exception to preemption, the South Carolina Supreme Court, based on the conclusory premise that the incidental reference in Lewis' action to the expectation of retirement benefits as a measure of damages implicated the Union Constitution and in turn LMRA and ERISA, held that Lewis' action was preempted by the Union Constitution, in effect ruling that, contrary to Lueck, Lingle and Livadas, the Union was granted by its Constitution the liberty to willfully and wantonly violate the South Carolina Right to Work Act.

V. An order remanding a case to the state court from which it was removed without specifying lack of subject matter jurisdiction or defects in procedure as grounds for remand is appealable and has preclusive effect on the preemption issue decided by United States District Judge.

The decision of the South Carolina Supreme Court is in direct conflict with the holding by this Court that a remand order to state court from which it was removed without specifying therein lack of subject matter jurisdiction or defects in procedure as grounds of remand is appealable and of preclusive effect on the issue of preemption. Quackenbush v. Allstate Insurance Co., 517 U.S. 706 (1996).

The South Carolina Supreme Court, in holding that the remand order of the United States District Judge was not preclusive on the preemption issue, reasoned "it is impossible to determine for certain the basis of the federal Court's remand as it merely states remand was improvident" and relied for its conclusion on Nutter v. Monongoblea Power Co., 4 F.3d 319 (4th Cir. 1998). See Things Remembered, Inc., v. Petrarca, 516 U.S. 124, 130 (characterizing Nutter as dicta).

Moreover, reference to the motions hearing held by the United States District Judge before the case was remanded to the state court for trial eliminates any possibility that the remand order was issued pursuant to 28 U.S.C. § 1447(c). Upon removal, the United States District Judge assumed and exercised jurisdiction to decide the issues presented by the parties, to wit: (1) the motion of the union to set aside the entry of default entered against it; (2) the preemption issue; and (3) Lewis' motion to remand.

After hearing arguments by respective counsel for the parties and considering the written memorandum submitted to the Court, the District Judge first granted the union's motion to set aside the entry of default entered against it, agreed and embraced Lewis' contention that his claim was

not preempted, and finally, exercising his discretion remanded to the state court for trial the pendant or supplemental state law claim for violation of the South Carolina Right to Work Act. Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988); Executive Software North America, Inc. v. U.S. District Court, 24 F.3d 1545, 1549 (9th Cir. 1994).

Accordingly, the decision of the federal court was of preclusive effect on the issue of preemption from which it follows that the judgment of the South Carolina Supreme Court should be reversed and the judgment of the trial court should be reinstated.

VI. Important Labor Law Questions of National Interest

This case presents important labor law questions of national interest affecting federal-state relations, principles of comity, labor union-member relations, exceptions to federal preemption as applied to state right to work statutes, labor union members' rights under state right to work acts, and, *inter alia*, Congressional intent in applying the federal preemption doctrine to state remedies which touch interests deeply rooted in local feeling and responsibility.

CONCLUSION

For the foregoing reasons and those set forth in the dissenting opinion of the South Carolina Court of Appeals and in the Petition for Rehearing, this Court should grant the Petition for Writ of Certiorari, reverse the judgment of the South Carolina Supreme Court, affirm the judgment of the trial court, and remand the case with directions to reinstate the judgment of the trial court together with costs and reasonable attorney fees.

Respectfully submitted,

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL O. LEWIS, As Personal Representative of the Estate of N.G. Lewis, Deceased,

Petitioner,

v.

LOCAL 382, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL-CIO),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Appendix to Petition for Writ of Certiorari

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael O. Lewis, As Personal Representative of the Estate of N.G. Lewis, Deceased,

Petitioner,

v.

Local 382, International Brotherhood of Electrical Workers (AFL-CIO), Davis Self, Larry Poole, Jerome Jenkins, Doris M. Jones, Bill Davis, John C. Davis and Ronald Goodale,

Defendants,

Of Whom Local 382, International Brotherhood of Electrical Workers (AFL-CIO) is,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 24965

Heard December 15, 1998 - Filed July 12, 1999

ENTERED: JULY 12, 1999

AFFIRMED IN RESULT

Henry Hammer and Howard Hammer, of Hammer, Hammer, Carrigg & Potterfield, of Columbia, and Scott Elliott, of Elliott and Elliott, of Columbia, for petitioner.

Herbert Buhl, III, of Columbia, and Terry R. Yellig, of Sherman, Dunn, Cohen, Leifer, & Yellig, of Washington,

D.C., for respondent.

WALLER, A.J.: We granted certiorari to review the Court of Appeals' opinion in *Lewis v. Int'l Brotherhood of Electrical Workers*, 324 S.C. 412, 481 S.E.2d 135 (Ct. App. 1997). We affirm in result.

FACTS[1]

Lewis, an electrician,[2] was a member of the International Brotherhood of Electrical Workers (IBEW), Local #382, for approximately 30 years. In 1987, his membership in the union lapsed when he continued to work for an employer which had been declared "in difficulty" by the IBEW.[3] In February, 1988, the IBEW informed Lewis he was ineligible to receive retirement benefits from the IBEW Pension Benefit Fund because he was no longer a member in good standing.[4] Lewis brought this action seeking damages for violation of the South Carolina Right-to-Work Act, S.C.Code Ann. §§ 41-7-10 through -90 (Rev. 1986 Lewis v. Int'l Brotherhood of Electrical Workers & Supp. 1997).[5] The jury returned a verdict in favor of Lewis against the union and awarded $82,560.00 in actual

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[1] The reader is directed to the Court of Appeals' opinion for a more complete recitation of the facts.

[2] Lewis died in 1990; his son Michael has been substituted as plaintiff.

[3] IBEW's Constitution prohibits members from "[w1orking for any ... company declared in difficulty" with the union. Art. VII, § 11.

[4] Article XII, Section 1(a)(1) of Union's constitution provides for pension benefits to "A" members of the IBEW who are in "continuous good standing with twenty (20) or more years immediately preceding his application, who has attained the age of sixty-five (65) years."

[5] He also filed a claim for outrage; the jury returned a verdict for the defendants on this claim.

damages and $25,000 in punitive damages. In a well reasoned opinion, Judge Anderson, writing for a majority of the Court of Appeals, held Lewis'claims were preempted by federal law. We agree and, accordingly, affirm in result.[6]

ISSUES

1. Is the federal court's order remanding to state court, preclusive on the preemption issue?

2. Is Lewis' claim preempted under 28 U.S.C. § 185 of the Labor Management Relations Act (LMRA)?

3. Should the Court of Appeals have addressed Lewis' claim under the South Carolina Right-To-Work Act?

4. Is Lewis' claim preempted under § 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.§ 1144(a)?

1. PRECLUSION

We concur in the Court of Appeals'holding that the federal court's order remanding to state court is not preclusive on the issue of preemption.[7]

---

[6] Except as otherwise noted herein, we agree with and adopt the reasoning set forth in the Court of Appeals' opinion. Readers are referred to that opinion for a more detailed and thorough discussion of the issues.

[7] Lewis initially filed this action in state court, and the matter was removed to federal court by the IBEW.. In response to Lewis' motion, the district court remanded to state court, finding removal had been improvident.

As noted by the Court of Appeals, the Fourth Circuit has specifically held a district court's findings incident to an order of remand have no preclusive effect. *Nutter v. Monongahela*, 4 F.3d 319 (4th Cir. 1993)(district court's holding that ERISA and LMRA did not preempt not prevent defendant from raising preemption as a defense in state court).[8] Accordingly, the Court of Appeals properly held the federal court's remand order was not preclusive. *Accord Nichols v. Amalgamated Clothing*, 305 S.C. 323~ 408 S.E.2d 237 (1991)(addressing merits of preemption issue after remand from federal court).

2. PREEMPTION UNDER LMRA

If a state-law cause of action does not exist independently of a labor contract, it is pre-empted by Section 301 of the Labor Management Relations Act (LMRA). *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); *Nash v. AT & T Nassau Metals*, 298 S.C. 428, 381 S.E.2d 206 (1989); *Butts v. AVX Corp.*, 292 S.C. 256, 355 S.E.2d 876 (Ct.App.1987). In *Nash v. AT & T Nassau Metals*, 381 S.E.2d 206, 208, 298 S.C. 428 (1989), we stated:

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[8] The rationale for holding a district court's remand order has no preclusive effect on the issue of preemption is that such remand orders are not subject to appellate review under 28 U.S.C. § 1447(d). Since *Nutter,* the United States Supreme Court decided *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712,135 L.Ed. 2d 1 (1996) in which it held a remand order which is not based upon either subject matter jurisdiction or defects in the removal procedure (i.e., pursuant to §1447(d)), is subject to appellate review such that it may be given preclusive effect. (*Quackenbush* involved a remand based on abstention principles). Here, it is impossible to determine for certain the basis of the federal court's remand order as it merely states removal was improvident. Accordingly, we decline to give it preclusive effect.

> This test is one of whether the state claim exists independently of the collective bargaining agreement or whether it is "inextricably intertwined" with a consideration of the terms of the agreement. If the state claim does not exist independently of the agreement, it is preempted by federal law.

The Court of Appeals found Lewis' claim was substantially dependent upon an analysis of the IBEW constitution because interpretation of the constitution was essential to a determination of whether Lewis had any property rights in the pension benefit fund. We agree.

Lewis' tort claim intrinsically relates to the nature of the IBEW constitution. His complaint states that the IBEW, "in violation of the Right-To-Work Act, attempted to interfere with [Lewis'] exercise of his Right-To-Work and did, thereby cause him to lose his pension benefits," and that as a result Lewis "has suffered the loss of his pension benefits." It is impossible to ascertain, without reference to IBEW's constitution, whether the union acted properly in denying Lewis his pension benefits. Accordingly, we concur with the Court of Appeals' analysis that resolution of the case was "substantially dependent" upon the union's constitution so as to be preempted under the LMRA.[9]

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[9] We agree with the Court of Appeals that our holding in *Nichols v. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC*, 305 S.C. 323~ 408 S.E.2d 237 (1991) is not controlling. The United States Supreme Court, in *Wooddell v. International Brotherhood of Elec. Workers Local 71*, 502 U.S. 931 112 S.Ct. 494~ 116 L.Ed.2d 419 (1991), extended the preemption provision of the LRMA to union constitutions. *Nichols* specifically held the employee's complaint was not preempted because the circuit court needed only to focus upon ACTWU's *constitution*, by-laws, and prior practices. Accordingly, to the extent *Nichols* conflicts with *Wooddell*, it is overruled.

We likewise agree with the Court of Appeals' analysis regarding this Court's opinion in *Kimbrell v. Jolog Sportswear, Inc.*, 239 S.C. 415~ 123 S.E.2d 524 (1962), in which we held an action for wages under this state's statutory law was not preempted by the NLRA. In *Kimbrell*, there

Finally, Lewis relies on this Court's opinion in *Layne v. Int'l Brotherhood of Elec. Workers*, 271 S.C. 3462 247 S.E.2d 346 (1978), in which we held, under similar facts, the plaintiffs state law claim under the Right-To-Work Act was not preempted by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. s 411 et seq. *Layne* dealt with Section 413 of the LMRDA which specifically states, "Nothing contained in this subchapter (29 U.S.C. §§ 411- 415) shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization." However, Section 413 of the LMRDA limits its application to that subchapter of the LMRDA.[10] Section 413 of the LMRDA does not apply to Section 301 of the LMRA. To hold otherwise would completely eviscerate the preemption provisions of Section 301 of the LMRA.[11]

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was no conflict with federal jurisdiction and the National Labor Relations Act afforded no remedy to plaintiffs for the wrongs done them. Here, there is a conflict with federal jurisdiction, inasmuch as the Court would be required to interpret the union's constitution. Moreover, in the present case, counsel for the IBEW advised the Court at oral argument that Lewis may file a claim for unfair labor practices with the National Labor Relations Board, or may have a claim for unfair labor practices under section 301 of the LMRA. Accordingly, unlike the plaintiff in *Kimbrell*, Lewis is not without a remedy.

[10] The subchapter of the LMRDA in question, § 411(a)(5) deals with due process measures a union member must be afforded prior to being disciplined. As we read Section 413, it was intended to permit union members the procedural due process afforded by state law if it was greater than that permitted by Section 411.

[11] Moreover, the issue of Section 301 preemption was not raised in *Layne*. This Court will not generally raise issues *sua sponte*. *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995)(but for very few exceptional circumstances, appellate court will not *sua sponte* raise issues).

3. PREEMPTION UNDER ERISA

Finally, a majority of the Court of Appeals held Lewis' claim was preempted by Section 514(a) of ERISA as his claim for damages "related to" an employee benefit plan within the scope of ERISA's preemption clause.[12] It held the resolution of Lewis' claim directly affected the pension fund as it "potentially alters the criteria for receipt of benefits." 481 S.E.2d at 142. We agree.

Any and all State laws insofar as they relate to employee benefit plans are preempted by ERISA. 29 U.S.C. § 1144(a); *Duncan v. Provident Mut. Life Ins. Co. of Philadelphia*, 310 S.C. 4652 427 S.E.2d 657 (1993). This Court has recognized that the pre-emptive effect of ERISA is a broad one. *Baker Hosp. v. Isaac*, 301 S.C. 248, 391 S.E.2d 549 (1990). A state law "relates to" an ERISA-governed employee benefit plan, "if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). Further, a state law "relates to" an ERISA plan if the rights or restrictions it creates are predicated on the existence of such a plan. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d474(1990). However, those state actions which affect employee benefit plans in "too tenuous, remote or peripheral a manner" do not relate to the plan. *Shaw v. Delta Air Lines, supra.*

A state rule of law may be preempted even though it has no direct nexus with ERISA plans if its effect is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration, or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states. *Keystone Chapter, Assoc. Builders v. Foley*, 37 F.3d 945,

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[12] There is no dispute but that Lewis'pension plan is an "employee benefit plan" within the meaning of ERISA, 29 U.S.C.§§1002(2)(A)(I) & 1002(3).

955 (3d Cir. 1994), cert. denied, ___ U.S.___ 115 S.Ct. 1393, 131 L.Ed.2d 244 (1995).

Here, it is inescapable that Lewis' claim is predicated upon the existence of IBEW's plan, i.e., is premised on the notion that the union's violation of the Right-To-Work Act resulted in the loss of his pension. Accordingly, we affirm the Court of Appeals'ruling.

In dissent, Judge Cureton points to a recent United States Supreme Court opinion narrowing the scope of ERISA preemption. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, ___, 115 S.Ct. 1671, 16771 131 L.Ed.2d 695 (1995). In *Travelers*, the Court noted the listarting presumption that Congress did not intend to supplant state law, 514 U.S. at 654, 115 S.Ct. at 1676, stating if "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "really, universally, relations stop nowhere." The *Travelers* court acknowledged, however, that "a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a state law might indeed be pre-empted under Section 514. 514 U.S. at 668, 115 S.Ct. at 1683 Even under the more narrow view of *Travelers*. allowing Lewis' claim in this case would essentially render the union liable for the benefits, notwithstanding its constitutional provisions to the effect that only members in good standing are entitled to benefits. As such, it would, by indirect means, force the union to adopt a certain scheme of substantive coverage contrary to its constitutional provisions. Such a holding is contrary to *Travelers*.

Finally, the dissent cites several cases for the proposition that ERISA does not preempt state claims where employees merely seek lost pension benefits as a measure of damages. *See Pizlo v. Bethlehem Steel Corp* ., 884 F.2d 116 (4th Cir.1989); *Hospice of Metro Denver, Inc. v. Group*

Health Ins.. of Oklahoma, Inc., 944 F.2d 752 (10th Cir.1991); *Howard v. Indiana Michigan Power Co.*, 812 F.Supp. 135 (S.D.Ind. 1992); *Schlenz v. United Airlines, Inc.*, 678 F.Supp. 230 (N.D.Cal.1988). We are unpersuaded by this authority. The dissent directly cites *Pizlo* for the following proposition:

> The claims here would not submit [the employer] to "conflicting employer obligations and variable standards of recovery", "determine whether any benefits are paid" nor "directly affect the administration of benefits under the plan." The claims do not bring into question whether Plaintiffs are eligible for plan benefits, but whether they were wrongfully terminated from employment after an alleged oral contract of employment for a term.

324 S.C. at 436,481 S.E.2d at 147. Here, Lewis' claim would subject the IBEW to conflicting obligations (i.e., it is liable under state law for the pension, but it is not liable under its constitution for the pension), and would bring into question whether or not Lewis was eligible for plan benefits. Accordingly, we do not find *Pizlo* dispositive. Further, the other case directly quoted by Judge Cureton, *Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma, Inc.*, 944 F.2d 752 (10th Cir.1991), did not involve beneficiaries of an ERISA plan. Moreover, *Hospice* is contrary to this Court's recent opinion in *Baker Hospital v. Isaac*, 301 S.C. 248, 391 S.E.2d 549 (1990)(holding ERISA preempted a hospital's contract, promissory estoppel, negligence, and misrepresentation claims).

4. RIGHT-TO-WORK ACT

The Court of Appeals held Lewis had failed to state a cause of action as the conduct he complained of did not constitute a violation of the Right-To-Work Act. Given its holding that Lewis' claim was preempted, it was unnecessary for the Court of Appeals to address this issue. Accordingly, we vacate the portion of the Court of Appeals' opinion holding Lewis failed to state a claim under the Right-To-Work Act.

CONCLUSION

We concur with the majority opinion of the Court of Appeals that Lewis' claims are preempted by both the LMRA and ERISA, since he is essentially seeking to recover his pension benefits, albeit under the guise of a Right-To Work claim. Accordingly, we affirm, in result. However, to the extent the Court of Appeals addressed the viability of Lewis' state law claim, its opinion is vacated.

AFFIRMED IN RESULT. [13]

FINNEY, C.J., TOAL, MOORE, and BURNETT, JJ., concur.

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[13] We also granted certiorari to review the Court of Appeals' unpublished opinion in this matter, Op. No. 96-UP-335 (S.C. Ct. App. filed October 15,1996), concerning Lewis' entitlement to attorneys' fees. In light of our holding in this case, we affirm the Court of Appeals' dismissal of that appeal as moot.

THE SUPREME COURT OF SOUTH CAROLINA

Michael O. Lewis, as Personal Representative of the Estate of N.G. Lewis, Deceased,

Petitioner,

v.

Local 382, International Brotherhood of Electrical Workers (AFL-CIO), Davis Self, Larry Poole, Jerome Jenkins, Doris M. Jones, Bill Davis, John C. Davis and Ronald Goodale,

Defendants,

of whom Local 382, International Brotherhood of Electrical Workers (AFL-CIO) is

Respondent.

ENTERED: APRIL 9, 1998

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in Lewis v. Local 382, Int'l Brotherhood of Electrical Workers (AFL-CIO), Op. No. 96-UP-335 (S.C. Ct. App. filed October 15, 1996). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(h), SCACR.

/s/ Ernest A. Finney, Jr. C.J.
/s/ Jean H. Toal A.J.
/s/ James E. Moore A.J.
/s/ John H. Waller, Jr. A.J.
/s/ E. C. Burnett, III A.J.

Columbia, South Carolina
April 9, 1998

Michael O. LEWIS, as Personal Representative of the Estate of N.G. Lewis, Deceased, Respondent,

v.

LOCAL 382, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL-CIO), Davis Self, Larry Poole, Jerome Jenkins, Doris M. Jones, Bill Davis, John C. Davis and Ronald Goodale, Defendants,

of whom Local 382, International Brotherhood of Electrical Workers (AFL-CIO) is Appellant.

No. 2573.

Court of Appeals of South Carolina.

Heard Sept. 12, 1996.
Decided Oct. 14, 1996.

ENTERED: October 14, 1996

Herbert E. Buhl, III, Columbia; and Terry R. Yellig, of Sherman, Dunn, Cohen, Leifer & Yellig, Washington, D.C., for appellant.

Henry Hammer and Howard Hammer, both of Hammer, Hammer, Carrigg & Potterfield; and Scott Elliott, Columbia, for respondent.

ANDERSON, Judge:

This is an action for an alleged violation of the South Carolina Right-to-Work Act.[1] The jury returned a verdict against Local 382 of the International Brotherhood of Electrical Workers (Local 382) in the amount of $82,560

[1] S.C. Code Ann. §§ 41-7-10 through -90 (Rev. 1986 & Supp. 1995).

actual damages and $25,000 punitive damages. A defense verdict was returned in favor of the other defendants. The trial court denied Local 382's post-trial motions. The union appeals. We reverse.

FACTS/PROCEDURAL BACKGROUND

In September of 1948, N.G. Lewis joined Local 382 and remained a member until 1986. When he was initiated as a member of Local 382, Lewis signed an oath that he would abide by all of the provisions of the IBEW Constitution, its rules and laws, as well as those of Local 382. Article XXVII, Section 1, Subsection 17 of the IBEW Constitution prohibits members from "[working for any ... company declared in difficulty with a [Local Union] or the I.B.E.W., in accordance with [the] Constitution."

In 1986, Lewis was employed by United Electric Company (United) as a foreman when United refused to sign a collective bargaining agreement with Local 382. Local 382 then petitioned the National Labor Relations Board to conduct a representation election among the employees of United to determine whether they wanted Local 382 to be certified as their exclusive bargaining representative. A majority of those United employees voted not to certify Local 382 as their exclusive bargaining representative.

On April 11, 1986, Local 382's business manager, Davis S. Self, wrote a letter to United employees, including Lewis, who were members of Local 382. In the letter, Self informed the members that United had been declared "in difficulty" by the IBEW International President. Furthermore, the letter advised each Local 382 member that his membership in Local 382 could be in jeopardy if he continued his employment with United. Lewis was a member of the Executive Board of Local 382 at the time this notice was sent.

In a memo dated July 23, 1986, Lewis, citing personal and health reasons, resigned from the Executive

Board of Local 382 effective July 25, 1986. Self sent Lewis a letter inviting him to attend the Union's Executive Board meeting on September 12, 1986, at which time a complaint concerning his employment by United would be discussed.

After November 1986, Lewis ceased paying his union membership dues. As a result, Lewis was dropped as a member of Local 382 and the IBEW after he failed to pay his dues for six months. According to Article XXIII, Section 4 of the IBEW Constitution, "any member indebted to his [Local Union] for six (6) months' full dues shall be dropped from membership by the [Financial Secretary]...." Furthermore, Article XXIII, Section 5 provides that "[m]embers in arrears forfeit all rights and previous standing in the I.B.E.W."

In December of 1986, Ronald Goodale, a Local 382 member, filed internal union charges against Lewis because he continued to work for United in violation of Article XXVII, Section 1, Subsection 17 of the IBEW Constitution. On December 19, 1986, pursuant to Goodale's charges, Local 382's Recording Secretary notified Lewis a hearing before the Union's trial board would be convened on January 9, 1987, at which time Lewis could answer the charges against him.

At the hearing, Lewis admitted he was working for United. He argued, however, he could not travel, due to a medical condition, to Augusta, Georgia to work for a contractor covered by the terms and conditions of a collective bargaining agreement negotiated by the IBEW Local Union in that area. The trial board agreed to delay, until it received information about the medical condition of Lewis, its decision whether Lewis had violated the IBEW Constitution by continuing to work for United after it was declared "in difficulty." On January 19, 1987, Dr. Richard T. Alia wrote a letter advising that Lewis had been diagnosed with ulcerative proctitis in 1982, but that as of May 15, 1984, the last time Lewis was seen by Dr. Alia's late partner, the proctitis was in remission.

On February 13, 1987, the trial board again considered the charges against Lewis in light of Dr. Alia's letter. The trial board decided Lewis had violated the IBEW Constitution by continuing to work for United after it was declared "in difficulty." The board further decided to fine Lewis $2000.00, but indicated the fine would be suspended if Lewis terminated his employment by United and sought employment with a contractor who was a party to a collective bargaining agreement with Local 382 or some other IBEW Local Union.

In a letter dated February 16, 1987, the Local 382 Recording Secretary notified Lewis of the trial board's disposition of the charges against him. The letter advised Lewis the $2,000.00 fine would be suspended if he would terminate his employment with United and accept employment with a union contractor within 30 days. Self, Local 382's business manager, told Lewis he could obtain employment with a union contractor in Augusta, Georgia.

Lewis, who continued to work for United, never paid the $2,000.00 fine, nor did he appeal the trial board's decision to the IBEW Vice President who has jurisdiction over Local 382. Additionally, Local 382 never took any action to collect the fine.

In a February 8, 1988 letter, the IBEW informed Lewis he was ineligible to receive retirement benefits from the IBEW Pension Benefit Fund because he was no longer a member in good standing.[2] Article XII, Section *138

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[2] The letter, which was signed by Jack F. Moore, an IBEW Trustee, in relevant part provided:

> Records in this office indicate that you were an "A" member of the IBEW from September 1948 through November 1986. When you did not tender any further dues thereafter, you were dropped from membership and, as you know, when a member of the IBEW is dropped from membership, he immediately forfeits any claim to IBEW pension or death benefits as a consequence of his "A" membership in the IBEW.

1(a)(1)of the IBEW Constitution sets forth the criteria for receiving retirement benefits from the IBEW Pension Benefit Fund. That section in pertinent part provides:

> Sec. 1. An "A" member who retires from the electrical trade after January 1, 1967, shall be entitled to benefits in accordance with the following rules as to eligibility:
>
> (a)(1) Normal Pension. An "A" member of the I.B.E.W. in continuous good standing with twenty (20) or more years immediately preceding his application, who has attained the age of sixty-five (65) years, shall receive pension benefits computed on the basis of two dollars ($2.00) per month for each full year of such continuous "A" membership.

In May 1988, Lewis retired from United. He lost his benefits and this suit followed.

On April 18, 1989, Lewis initiated this action seeking damages for violation of the South Carolina Right-to-Work Act, S.C.Code Ann. §§ 41-7-10 through -90 (Rev.1986 & Supp.1995). Lewis alleged the defendants, acting individually and as agents of the defendant Local 382, interfered with his right to work, and caused him to lose his pension benefits and to suffer other damages. Lewis further claimed he paid dues and made contributions to the union and its pension plan with the expectation of drawing a pension when he retired.

On May 26, 1989, the defendants filed a petition for removal in the United States District Court for the Columbia Division of South Carolina. Thereafter, Lewis petitioned for a remand to state court. On August 9, 1989, the federal court remanded the case to state court "upon the ground that removal was improvident."

The defendants moved to dismiss this action on several grounds: (1) the alleged violation of the Right-to-Work Act was preempted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185; (2) the alleged violation of the Right-to Work Act was preempted by § 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a); (3) the Right-to-Work Act did not preclude Local 382 from enforcing its membership rules against members who violated them; and (4) the prior decision *of Layne v. International Bhd. of Elec. Workers*, 271 S.C. 346, 247 S.E.2d 346 (1978), was not applicable. Although it did not rule on the defendants' motion to dismiss prior to trial, the trial court [324 S.C. 419] denied the motion when it was renewed as a motion for a directed verdict at the conclusion of the presentation of Lewis' case-in-chief.

The jury returned a verdict in favor of the plaintiff[3] against Local 382 on the right-to-work claim, but not against the individual defendants remaining in the case. Further, the jury awarded Lewis $82,560.00 in actual damages and $25,000 in punitive damages against Local 382. The jury also returned verdicts on the claim of outrage[4] in favor of each of the defendants.

Local 382 immediately filed motions for judgment notwithstanding the verdict; remittitur or, in the alternative, for a partial new trial; and/or a reduction in the award of actual and punitive damages. On April 13, 1995, the trial court issued an order denying the defendants' post-trial motions, affirming the award of punitive damages, and

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[3] N.G. Lewis died on July 9, 1990. Thereafter, his son, Michael O. Lewis, was appointed personal representative of Lewis's estate and substituted as plaintiff in this action.

[4] Lewis also brought an action for outrage. However, there is no appeal from the jury's verdict for the defendants on that issue.

entering final judgment against Local 382 in the amount of $82,560, plus court costs, and $25,000 in punitive damages.

ISSUES

I. Did the trial court err in failing to dismiss the claim for violation of the South Carolina Right-to-Work Act because it is preempted by the Labor Management Relations Act?

II. Did the trial court err in failing to dismiss the claim for violation of the South Carolina Right-to-Work Act because it is preempted by the Employee Retirement Income Security Act?

III. Did the trial court err in failing to dismiss the claim for violation of the South Carolina Right-to-Work Act because the Act does not preclude unions from enforcing membership rules?

IV. Does the Court's prior decision of Layne v. International Bhd. of Elec. Workers, supra, apply to this action?

V. Did the trial court err in failing to reduce the jury's award of actual and punitive damages?

LMRA[5] PREEMPTION

[1] Local 382 maintains the essence of Lewis's claim is that the actions of the local union deprived him of his property interest in pension benefits provided by the IBEW Pension Benefit Fund. Since interpretation of the IBEW Constitution is essential to a determination of whether Lewis had a property interest in the pension benefits, the union contends § 301 of the LMRA preempts his state law claim.

Section 301 of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties....

29 U.S.C. § 185(a) (1978 & Supp.1996).

[2] In Local 174, *Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104, 82 S.Ct. 571, 577, 7 L.Ed.2d 593 (1962), the United States Supreme Court explained that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." The prospect that "individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Id. at 103, 82 S.Ct. at 576-77. The preemptive effect of s 301 is necessary "in

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[5] The parties refer to the preemption as s 301 of the National Labor Relations Act. In 1947, Congress enacted the Labor Management Relations Act which encapsulated the old National Labor Relations Act and added many sections.

order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404, 108 S.Ct. 1877, 1880, 100 L.Ed.2d 410 (1988).

[3, 4] If a state law tort claim is founded on a duty that is created by a collective bargaining agreement and without existence independent of the agreement, then it is preempted by § 301. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). "[A] plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective-bargaining agreement." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987) (emphasis in original). In Lingle, supra, the Court stated:

> [Section] 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.

Lingle, 486 U.S. at 409, 108 S.Ct. at 1883.

In discussing whether a state law claim is preempted by s 301 of the LMRA, our Supreme Court has adopted the following standard:

> The United States Supreme Court has provided a test for determining whether a state law claim is preempted by § 301 of the LMRA. This test is one of whether the state claim exists independently of the collective bargaining agreement or whether it is

> "inextricably intertwined" with a consideration of the terms of the agreement. If the state claim does not exist independently of the agreement, it is preempted by federal law. In determining this issue, we look to whether the tort claim intrinsically relates to the nature and existence of the agreement. Questions that relate to what the parties to a labor agreement intended and what legal consequences were intended to flow from the contract must be resolved by reference to federal law regardless of whether these questions arise in the context of an action alleging breach of contract or liability in tort. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). When assessing whether a state law remedy is "independent" of the collective bargaining agreement, we must examine whether resolution of the state claim requires construction of the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). Whether a cause of action is subject to preemption depends upon the facts of the particular case and the relationship of the alleged tort to the contract must be determined on a case by case basis. *Allis-Chalmers v. Lueck*, supra. Our Court of Appeals has recognized this.

Nash v. AT & T Nassau Metals, 298 S.C. 428, 432, 381 S.E.2d 206, 208 (1989).

The United States Supreme Court has concluded that § 301 not only provides federal court jurisdiction over disputes involving collective bargaining agreements, but also authorizes the federal courts to fashion a body of federal law

for the enforcement of such agreements. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). Accordingly, a preemption doctrine under § 301 has developed which was summarized in Lingle, supra:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles--necessarily uniform throughout the nation--must be employed to resolve the dispute.

Lingle, 486 U.S. at 405-06, 108 S.Ct. at 1881.

More recently, the United States Supreme Court extended the jurisdictional reach of § 301 to union constitutions. In *Wooddell v. International Bhd. of Elec. Workers, Local 71, et al.*, 502 U.S. 93, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991), the Court held s 301 confers subject matter jurisdiction upon the federal courts for suits by individual union members against their union for alleged breach of union constitutions. The Court further amplified the issue and held:

> In concluding that the employee's suit was one provided for by § 301, we observed that under a contrary holding there would be " '[t]he possibility that individual contract terms might have different meanings under state and federal law [which] would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' " (citations omitted).

> Similar considerations bear on this case. Congress expressly provided in § 301(a) for federal jurisdiction over contracts between an employer and a labor organization or between labor organizations. Collective-bargaining agreements are the principal form of contract between an employer and a labor organization. Individual union members, who are often the beneficiaries of provisions of collective-bargaining agreements, may bring suit on these contracts under § 301. Likewise, union constitutions are an important form of contract between labor organizations. Members of a collective-bargaining unit are often the beneficiaries of such interunion contracts, and when they are, they likewise may bring suit on these contracts under § 301. (emphasis in original).
>
> If they could not, unacceptable consequences could ensue. There is no doubt that IBEW could sue under § 301 to enforce Local 71's contract with IBEW and there is no doubt that such a suit would be governed by federal law. If suit by an employee to enforce an interunion contract is not authorized by s 301 and the employee is remitted to state court and to state law, it is plain that the same contract terms might be given different meanings based solely on the identity of the party. This would exert the disruptive influence our cases have spoken of.

Wooddell, 502 U.S. at 101-02, 112 S.Ct. at 500.

Lewis relies on our Supreme Court's decision of *Nichols v. Amalgamated Clothing & Textile Workers Union*, 305 S.C. 323, 408 S.E.2d 237 (1991), to support his position. In that case, the Supreme Court held an action by an elected

manager of a local labor union to compel payment of his salary by the parent national labor union was not preempted by the NLRA. The Court noted it needed to focus only on the union's constitution, by-laws, and prior practices to determine whether the plaintiff was entitled to payment of the wages he claimed were owed to him. However, since the Court decided Nichols, the United States Supreme Court issued the *Wooddell* opinion.

In light of *Wooddell*, Nichols is not precedential.

We conclude Lewis's claim under the South Carolina Right-to-Work Act is substantially dependant upon an analysis of the IBEW Constitution. Thus, it is preempted by § 301 of the LMRA. Reference to the IBEW Constitution is necessary to determine whether Lewis had acquired a property interest in pension benefits at the time of the alleged wrongful acts by Local 382. Article XII, Section 1(a)(1) of the IBEW Constitution sets forth the criteria for receiving retirement benefits from the IBEW Pension Benefit Fund. Accordingly, because interpretation of the IBEW Constitution is essential to a determination of whether Lewis had any property rights in the pension benefit fund, the state law claim under the Right-to-Work Act is preempted by § 301.

ERISA PREEMPTION

[5] Local 382 also argues the Right-to-Work claim of Lewis is preempted by § 514(a) of ERISA because it "relates to" an employee benefit plan. The union avers its alleged unlawful actions involved a benefit plan, i.e., Lewis's right to receive a pension from the IBEW Pension Benefit Fund. Accordingly, the union asserts preemption is applicable because "[a]ssuming, without conceding, that Mr. Lewis and other similarly situated former I.B.E.W. members have a property interest in pension benefits provided by the I.B.E.W. Pension Benefit Fund, I.B.E.W. Local Unions like Local No. 382 would be subject to conflicting obligations,

despite the express provisions in the I.B.E.W. Constitution to the contrary." Local 382 maintains § 514(a) of ERISA was intended to preclude such conflicting obligations.

We sketch the background of this issue cognizant that readers who hunger for more detail can find it in a myriad of reported cases.

ERISA expressly provides for the preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a) (1985). The "deliberately expansive" language of the preemption clause was "designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987) (quoting *Alessi v. Raybestos-Manhattan*, Inc., 451 U.S. [324 S.C. 425] 504, 523, 101 S.Ct. 1895, 1906, 68 L.Ed.2d 402 (1981)). ERISA defines "employee benefit plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3) (Supp.1996). ERISA further defines "employee pension benefit plan" as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--
>
> (i) provides retirement income to employees,....

29 U.S.C. § 1002(2)(A)(i) (Supp.1996). Through enactment of ERISA, Congress intended "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). Congress also intended to safeguard employers' interests by " 'eliminating

the threat of conflicting and inconsistent State and local regulation of employee benefit plans.' " Id. at 99, 103 S.Ct. at 2901.

We have recognized that while Congress intended for ERISA to preempt state laws insofar as they relate to any employee benefit plan, the preemption clause is not all encompassing. In *Medical Park OB/GYN v. Ragin*, 321 S.C. 139, 467 S.E.2d 261 (Ct.App.1996), we held:

> In interpreting the scope of this preemptive language, the United States Supreme Court has held the phrase "relate to" should be given its broad, common sense meaning such that a state law "relates to" an employee benefit plan within the meaning of § 1144(a) if it has a "connection with or reference to" such a plan. As such, a state law may be subject to preemption under ERISA "even if the law is not specifically designed to affect such plans, or the effect is only indirect." (citations omitted).

Id. at 143-44, 467 S.E.2d at 264 (state law claims of negligent misrepresentation, breach of fiduciary duty, and professional negligence do not "relate to" an ERISA plan when the claims are asserted against parties who allegedly advised plaintiff to adopt an ERISA plan and then misrepresented and/or failed to competently advise regarding the administration of the plan).

The IBEW Pension Benefit Fund is an "employee benefit plan" within the meaning of § 3(3) of ERISA, 29 U.S.C. § 1002(3) (Supp.1996). Therefore, the only question to be determined is whether Lewis's state law claim "relates to" the IBEW Pension Benefit Fund.

A state law "relates to" an ERISA-governed employee benefit plan, within the purview of ERISA's preemption clause, "if it has a connection with or reference

to such a plan." *Shaw,* 463 U.S. at 97, 103 S.Ct. at 2900. Further, a state law "relates to" an ERISA plan if the rights or restrictions it creates are predicated on the existence of such a plan. See *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). Thus, the state law may be preempted even though it has no direct nexus with an ERISA plan if its effect is to dictate or restrict the choices of an ERISA plan with regard to its benefits, structure, reporting, or administration.

Lewis seeks to recover as damages from the local union the pension benefits he claims he would have been entitled to but for the action of Local 382. The resolution of this claim directly affects the pension fund as it potentially alters the criteria for receipt of benefits. In this particular case, we hold the state law claim "relates to" an employee benefit plan within the scope of ERISA's preemption clause. Accordingly, Lewis's state law claim under the Right-to-Work Act is preempted.

LOCAL POLICY CONCERNS

Lewis contends his claim is not preempted by federal law because the union's conduct in this case is of merely peripheral concern to federal law and touches interests so deeply rooted in local policy and responsibility that courts should not assume that Congress intended to preempt the application of state law. Our state Supreme Court addressed this principle in *Kimbrell v. Jolog Sportswear, Inc.*, 239 S.C. 415, 123 S.E.2d 524 (1962). In *Kimbrell*, the Court held an action by employees against an employer and union to recover damages for tortious withholding of wages was not an action to regulate labor relations and was a matter in which the state had a compelling state interest. Accordingly, the claim was not preempted by federal labor law. However, the Court noted "[t]he prosecution of the present action for

damages causes no conflict with federal jurisdiction. The National Labor Relations Act affords no remedy to plaintiffs for the wrongs done them." Id. at 421, 123 S.E.2d at 527 (emphasis added).

In this case, there is a direct conflict between Lewis's right-to-work claim and the LMRA and ERISA. Therefore, Kimbrell does not support Lewis's contention that his claim is excepted from federal preemption.

EFFECT OF REMAND

[6] Lewis argues the union is precluded from raising the preemption issue in state court after remand from the federal court. When Lewis filed his complaint in state court, the union filed a petition for removal in the federal district court asserting ERISA preempted the application of the South Carolina Right-to-Work Act. Lewis filed a motion to remand in the district court contending the action was not brought under federal law, but solely under state law for a cause of action arising out of the South Carolina Right-to-Work Act. The federal court granted the motion of Lewis to remand "upon the ground that removal was improvident."

In support of his argument, Lewis relies upon the cases of *Osteen v. Atlantic Coast Line R.R.*, 119 S.C. 438, 112 S.E. 352 (1922), *and Howell v. Hartford Accident & Indem. Co., et al.*, 160 S.C. 549, 159 S.E. 380 (1931). Those cases state the proposition that a decision by a federal court to remand a case to state court is not judicially reviewable. However, that proposition does not answer the question of whether the federal court order precludes a state court from considering preemption arguments after remand.

In *Nutter v. Monongahela Power Co.*, 4 F.3d 319 (4th Cir.1993), the Fourth Circuit Court of Appeals held a district court's findings in a remand order concerning complete preemption under ERISA and LMRA did not have a preclusive effect and any issues decided incident to remand

could be relitigated in state court. The court further enunciated:

> Federal law determines the preclusive effect of federal orders on a question of federal law, regardless of whether the court applying the federal judgment is state or federal. The most significant factor in determining the preclusive effect of a district court's findings incident to remand is the unavailability of appellate review under § 1447(d). "Under contemporary principles of collateral estoppel," the unavailability of appellate review "strongly militates against giving" a judgment preclusive effect. While the availability of appellate review is not "always an essential predicate of estoppel," we do not believe the district court's jurisdictional findings incident to remand should preclude relitigation of the same issues in state court. Accordingly, we hold that the district court's jurisdictional findings regarding complete preemption have no preclusive effect. Under our holding, any issues that the district court decided incident to remand may be relitigated in state court. (citations omitted).

Nutter, 4 F.3d at 321-22.

We find *Nutter* dispositive of the procedural argument of Lewis.

EFFICACY OF SOUTH CAROLINA RIGHT-TO-WORK ACT

[7] Additionally, Local 382 asserts the South Carolina Right-to-Work Act cannot be interpreted broadly

enough to prohibit enforcement of its membership rule against union members who continue to work for employers determined to be "in difficulty."

South Carolina Code Ann. § 41-7-20 (Rev.1986 & Supp.1995) provides:

> Any agreement or combination between any employer and any labor organization whereby persons not members of such labor organizations shall be denied the right to work for such employer or whereby such membership is made a condition of employment, or of continuance of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy, unlawful and an illegal combination or conspiracy.

South Carolina Code Ann. § 41-7-70 (Rev.1986 & Supp.1995) provides in pertinent part as follows:

> It shall be unlawful for any person, acting alone or in concert with one or more persons:
>
> (1) By force, intimidation, violence or threats thereof, or violent or insulting language, directed against the person or property, or any member of the family *144 of any person (a) to interfere, or attempt to interfere, with such person in the exercise of his right to work, to pursue or engage in, any lawful vocation or business activity, to enter or leave any place of his employment, or to receive, ship or deliver materials, goods or services not

> prohibited by law or (b) to compel or attempt to compel any person to join, or support, or refrain from joining or supporting any labor organization.

The LMRA generally prohibits employers from discriminating against employees based on their union affiliation or activities, but § 8(a)(3) of the LMRA, 29 U.S.C. § 158(a)(3) (1973 & Supp.1996), expressly permits labor unions and employers to agree that membership in the labor union is a condition of employment, i.e., union security agreements. However, § 14(b) of the LMRA, 29 U.S.C. § 164(b) (1978 & Supp.1996), provides that, while union security agreements are permissible as a matter of federal law:

> [n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[8] As noted by our Supreme Court, "the evils to which the legislative intent and the remedial purpose of the statute were directed were: (1) union control of employment on the one hand; and (2) employer boycott of, or insistence upon, union labor on the other." *Branham v. Miller Elec. Co.*, 237 S.C. 540, 546, 118 S.E.2d 167, 170 (1961) (company's freedom to hire and fire employee at its pleasure is subject to the limitation that neither the hiring nor the firing may be grounded or conditioned upon union membership or nonmembership, referral or nonreferral, approval or nonapproval).

Lewis's claim has nothing to do with compulsory unionism, the focus of § 14(b) of the LMRA. This

controversy is not about any agreement between Local 382 and an employer. Rather, it is about the union's ability to enforce its internal rules against its members who joined voluntarily, and who are free to resign at any time. See *Pattern Makers' League v. National Labor Relations Board*, 473 U.S. 95, 105 S.Ct. 3064, 87 L.Ed.2d 68 (1985).

Since South Carolina is a right-to-work state and employees cannot be compelled to join unions, an employee's decision to join a union and abide by its rules is voluntary. The union's purpose in requiring its members to work only for employers with whom it has a collective bargaining agreement is to be able to offer employers access to skilled workers as the benefit of signing a contract. However, even if the union obtains a contract, that agreement does not give it control over the employment pool because the union cannot compel employees working under the contract to join as a condition of employment. Therefore, Local 382's actions in this case did not violate the Right-to-Work Act because Lewis's claim does not involve compulsory unionism.

LAYNE v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 382

[9] In *Layne v. International Bhd. of Elec. Workers, Local 382*, 271 S.C. 346, 247 S.E.2d 346 (1978), the Supreme Court affirmed the trial court's denial of the local union's demurrer to the complaint in a Right-to-Work claim. Layne, a union member for over thirty-five years, alleged he paid dues with the expectation of drawing a pension upon his retirement. He further alleged the union expelled him from membership because he was working on a construction project with nonunion members. Layne averred the union's action was a violation of the South Carolina Right-to-Work Act and, as a result, he suffered damages " 'in that he lost the benefit of monies paid to Defendants over thirty-five years.' " Id. at 348-49, 247 S.E.2d at 348. On

appeal, the union argued the complaint failed to state a cause of action because the conduct complained of did not constitute a violation of the Right-to-Work Act. The Supreme Court disagreed and held:

> [T]he attempt to coerce the plaintiff from engaging in the particular employment by means of threatening his expected retirement benefits constitutes a tortious violation of the Right to Work Act.
>
> ....
>
> Applying [Section 41-7-70] to the facts alleged in the complaint, it can reasonably be said that the union's actions constituted coercion and intimidation directed against the plaintiff and his property which was designed to effect compulsory support of the union and accomplish union control of the plaintiff's employment.

Layne, 271 S.C. at 350, 247 S.E.2d at 348.

Based upon the facts of this case, we conclude Layne is distinguishable. Layne was decided on a demurrer and the Court considered the factual allegations to be admitted. Id. In that respect, the Court considered as admitted the fact that Layne had a property interest in his expected pension benefit.

In contrast to Layne, this case was tried on its facts and the record is devoid of any evidence establishing that, at the time he was disciplined, Lewis had any vested right to future pension benefits from the IBEW. Rather, the evidence demonstrated Lewis had a contract with the union which would entitle him to pension benefits in the future if he fulfilled certain conditions set forth in the IBEW Constitution. The conditions could not be satisfied until the

member became eligible to apply for the pension benefit. Therefore, the benefit could not vest and the member would not obtain any property right in the benefits. Because Lewis did not satisfy the required conditions, he never acquired a property interest in the IBEW Pension Benefit Fund. As a result, we conclude there is no evidence of a "threat against property" and the Layne case is not controlling.

CONCLUSION

Based upon the above analysis, we conclude Lewis's action for an alleged violation of the South Carolina Right-to-Work Act is preempted by both LMRA and ERISA. The trial court erred in denying the union's trial and post-trial motions. Accordingly, the decision of the trial court is reversed and the case is remanded for a dismissal due to a lack of subject matter jurisdiction.

REVERSED AND REMANDED. [6]

GOOLSBY, J., concurs.
CURETON, J., dissents in a separate opinion.
CURETON, Judge (dissenting):

I respectfully dissent from the majority's holding and conclude that neither the LMRA nor ERISA preempts Lewis's cause of action. I also would hold that Lewis's allegations properly state a cause of action under South Carolina's Right to Work Act, S.C.Code Ann. s 41-7-10 et. seq. (1986).

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[6] Due to our disposition of the preceding issues, we find it unnecessary to consider the last issue stated by the union.

I. LMRA PREEMPTION

Section 301 of the LMRA is the provision authorizing actions based on contracts between employers, unions, local unions, and employees. In order for an action to fall within the purview of § 301, it must either be: (1) an action for violations of a contract between an employer and a labor organization which represents employees in an industry affecting commerce, or (2) an action for violations of a contract between such labor organizations. *Wooddell v. Int'l Bhd. of Elec. Workers*, 502 U.S. 93, 98, 112 S.Ct. 494, 498, 116 L.Ed.2d 419 (1991). Admittedly, the reach of § 301 preemption is broad. Because of concern about onflicting interpretations of labor-oriented contracts, § 301 preempts state law claims if "the resolution of the state law claim depends upon the meaning of a collective bargaining agreement." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-6, 108 S.Ct. 1877, 1881, 100 L.Ed.2d 410 (1988). See also *Hayden v. Reickerd*, 957 F.2d 1506 (9th Cir.1992) (noting that preemption is appropriate only when provisions of a § 301 contract must be interpreted). The proper test for § 301 preemption asks:

> ... whether the [state-law cause of action] confers nonnegotiable state-law rights on employers or employees independent [324 S.C. 433] of any right established by contract, or, instead, whether evaluation of the [state law] claim is inextricably intertwined with consideration of the terms of the labor contract. If the state tort law attempts to define the meaning of the contract relationship, that law is preempted.

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 (1985), cited in *Nash v. AT & T Nassau Metals*, 298 S.C. 428, 381 S.E.2d 206 (1989).

However, "not every dispute concerning employment, or tangentially involving a provision of the collective bargaining agreement, is pre-empted by § 301 or other provisions of federal labor law." *Lueck*, 471 U.S. at 211, 105 S.Ct. at 1911. The United States Supreme Court also has held that union constitutions are contracts between labor organizations under § 301, so the above stated preemption rules apply to interpretation of union constitutions as well as interpretation of collective bargaining agreements. Cf. *Wooddell*, 502 U.S. at 98-101, 112 S Ct. at 498-500 (holding that a union member may sue a local union for violation of the national union's constitution);[1] *United Ass'n of Jouneymen and Apprentices of the Plumbing and Pipefitting Indus. v. Local 334*, 452 U.S. 615, 101 S.Ct. 2546, 69 L.Ed.2d 280 (1981) (extending the jurisdictional reach of § 301 to union constitutions).

However, Lewis's claim that the local union's actions violated the South Carolina Right to Work Act does not present a case which falls under the admittedly broad preemption doctrine pursuant to § 301. First, the right to work statute cannot be superseded by agreement; the rights created therein are non-negotiable and thus meet that portion of the Lueck test. See S.C.Code Ann. § 41-7-10 et. seq. (1986) (stating that violations of the statute are against the public policy of South Carolina). Second, Lewis does not allege any sort of claim that the local union violated the IBEW constitution. Thus, Lewis's claim is not based directly on rights created by the union constitution; instead, it is based on rights created by South Carolina's right to work law. Third, Lewis's claim does not depend on any sort of interpretation of the union constitution. The record does not reflect any dispute among the parties at trial as to the only issues that could possibly involve interpretation of the

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[1] I agree with the majority that *Wooddell* would change the result in *Nichols v. Amalgamated Clothing and Textile Workers Union*, 305 S.C. 323, 408 S.E.2d 237 (1991).

union's constitution: (1) whether United Electrical was properly determined to be in difficulty, (2) whether Lewis was fined and suspended in accordance with the union's rules and constitution, and (3) whether Lewis eventually would have been entitled to pension benefits but for his membership lapse.[2] Thus, § 301 preemption is not applicable.

The majority contends that § 301 preempts Lewis's action because the union's constitution must be interpreted to determine whether Lewis had a property interest in pension benefits at the time of the union's alleged wrongful actions. However, the pension benefits are only referred to in this action as a measure of Lewis's damages, and it is undisputed that Lewis, had he continued his membership of 38 years, would have been entitled to benefits upon his retirement but for the actions by the local union. Moreover, whether Lewis had a property interest in the pension benefits is irrelevant to the use of his expectancy in the benefits as a yardstick to measure his damages. Lewis does not have to show a property interest in the pension benefits in order to claim the loss of them as the measure of damages.[3] See *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 85 Ill.Dec. 475, 480,

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[2] There was testimony at trial about the proper procedure for putting an employer "in difficulty" with the union. However, the record reflects no conflicting testimony about whether the union properly put Lewis's employer "in difficulty."

[3] The majority distinguishes *Layne v. International Bhd. of Elec. Workers, Local 382*, 271 S.C. 346, 247 S.E.2d 346 (1978), because Layne involved a demurrer which required the court to accept the allegations in the pleadings as true. However, since I would hold that Lewis did not need to prove his pension benefits had vested in order to claim them as a measure of damages, I would further hold that Layne is applicable and binding. In any event, the Layne opinion is unclear as to whether Layne's benefits had vested, and the court referred to the "plaintiff's expectancy of retirement benefits." Id. at 350, 247 S.E.2d at 348 (emphasis added). Moreover, Lewis argues there are other elements of the damages award, i.e. emotional distress, humiliation, etc.

473 N.E.2d 1280, 1285 (1984), cert. denied, 474 U.S. 909, 106 S.Ct. 278, 88 L.Ed.2d 243 (1985) (holding that a plaintiff may claim loss of unvested pension benefits as a element of damages in a workers' compensation retaliatory discharge case). See also 22 Am.Jur.2d Damages § 115 (1988). In any event, mere reference to or consideration of the terms of a union constitution is not the equivalent of interpreting the meaning of the terms. *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 749 (9th Cir.1993) (holding that the provisions relating to promotion in a collective bargaining agreement did not require preemption of an action based on discrimination in promotion). Thus, Lewis's right to work action does not require an interpretation of the terms of the union constitution. I would hold that § 301 of the LMRA does not preempt Lewis's claim. Cf. *Baldwin v. Pirelli Armstrong Tire Corp.*, 927 F.Supp. 1046 (M.D.Tenn.1996) (holding that for purposes of removal, § 301 does not completely preempt a retaliatory discharge claim based on the Tennessee right to work statute).

II. ERISA PREEMPTION

I would also hold that ERISA does not preempt Lewis's right to work claim. Congress expressly enacted a provision which preempts any state cause of action which "relate[s] to" an employee benefit plan, and the United States Supreme Court has held that the "relate to" phrase should be given a broad, common sense meaning as "connection with or reference to." 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). However, the United States Supreme Court recently held that "relate to" cannot "extend to the furthest stretch of its indeterminacy," and that a court should "look instead to the objectives of the ERISA statute as a guide to the scope of state law that Congress understood would survive." *New York State Conference of Blue Cross & Blue Shield Plans v.*

Travelers Ins. Co., 514 U.S. 645, 115 S.Ct. 1671, 1677, 131 L.Ed.2d 695 (1995), cited in *Medical Park OB/GYN v. Ragin*, 321 S.C. 139, 467 S.E.2d 261 (Ct.App.1996). Congress intended ERISA to set the standards of conduct, responsibilities, and obligations for plan fiduciaries. 29 U.S.C. § 1001(b). Congress further intended the preemption clause to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers*, 514 U.S. 645, ----, 115 S.Ct. at 1677-78.

In interpreting the ERISA preemption statute, a number of courts have applied these standards to hold that mere reference to pension benefits as a measure of damages is not enough for a state cause of action to "relate to" the employee benefit plan. In *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir.1989), employees sued their employer for terminating them after the employer allegedly represented that it would not fire any employee before the age necessary to avoid an early retirement penalty. The *Pizlo* court held that ERISA did not preempt the employees' claims for breach of contract, promissory estoppel, and negligent misrepresentation. In doing so, the court stated:

> The claims here would not submit [the employer] to "conflicting employer obligations and variable standards of recovery", "determine whether any benefits are paid" nor "directly affect the administration of benefits under the plan." The claims do not bring into question whether Plaintiffs are eligible for plan benefits, but whether they were wrongfully terminated from employment after an alleged oral contract of employment for a term. In their state law claims, the Plaintiffs seek from the corporation compensatory damages for wages and pension, health, life and disability

> benefits that they would have been entitled to had the alleged contract to work until age 62 not been breached. If the Plaintiffs prevail, the damages would be measured in part by the lost pension benefits the Plaintiffs would have received, but the pension trust itself would not be liable and the administrators of the pension plan would not be burdened in any way.

Pizlo, 884 F.2d at 120-21 (citations omitted). In *Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma, Inc.*, 944 F.2d 752 (10th Cir.1991), a hospice sued an insurer on a promissory estoppel theory because the insurer refused to pay a claim after repeatedly assuring the hospice that payment would be forthcoming. Similarly, the Hospice court held that ERISA does not preempt the hospice's cause of action. In doing so, the Hospice court stated:

> Hospice has not alleged any conduct on the part of [the insurer] which relates to the administration of the plan, to the processing of any covered claim, or which impinges on any employee's ERISA rights.... [M]erely because [Hospice's] damages would be based upon the amount of potential plan benefits does not implicate the administration of the plan, and is not consequential enough to connect the [324 S.C. 437] action with, or relate the action to, the plan. The payment of the judgment would be a one time, lump-sum amount and would not further burden the plan, either financially or administratively.... An action brought by a health care provider to recover promised payment from an insurance carrier is distinct from an action brought by a plan participant against the insurer seeking recovery of benefits due under the terms of

> the insurance plan. Preemption in this case would stretch the "connected with or related to" standard too far. Therefore, we hold that Hospice's action is not preempted by ERISA.

Hospice, 944 F.2d at 755-56 (emphasis added) (citations omitted).[4] Admittedly, *Hospice* does not involve suit by former beneficiaries of a ERISA plan, but Pizlo does. Both cases hold unequivocally that ERISA does not preempt state causes of action merely because damages are measured by lost benefits. See also *Howard v. Indiana Michigan Power Co.*, 812 F.Supp. 135 (S.D.Ind.1992) (finding no ERISA preemption when the pension benefits relate to damages, not liability); *Schlenz v. United Airlines, Inc.*, 678 F.Supp. 230 (N.D.Cal.1988) (holding that ERISA does not preempt a wrongful discharge claim because the damage award, which is based partly on lost employee benefits, will be nothing more than a one-time lump-sum payment triggered by employer's conduct); *Totton v. New York Life Ins. Co.*, 685 F.Supp. 27 (D.Conn.1987) (ruling that ERISA does not preempt claim for breach of an employment contract even though lost pension benefits are sought as damages, in part because the plan will not pay the one-time lump-sum judgment). Cf. *Morstein v. National Ins. Serv., Inc.*, 93 F.3d 715 (11th Cir.1996) (en banc) (holding that ERISA does not

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[4] In *Baker Hospital v. Isaac*, 301 S.C. 248, 391 S.E.2d 549 (1990), the South Carolina Supreme Court held that ERISA preempted a hospital's contract, promissory estoppel, negligence, and misrepresentation claims. Like Hospice, the hospital sued after the insurer promised that a patient was covered, and then the insurer refused to pay. Id. However, Isaac 's finding of preemption was based on stipulations by the parties at oral argument that ERISA preempted the common-law causes of action. Id. Isaac also noted that it followed the "clear majority rule." Id. In this case, however, the parties disputed preemption. This case also occurs after the trend to narrow ERISA preemption in Hospice, Travelers, and the other authorities cited. Therefore, I do not think that Isaac changes the reasoning in this dissent.

preempt a company president's suit against an insurance agent for fraudulently and negligently inducing her to purchase a replacement policy with a pre-existing condition clause); *Custer v. Sweeney,* 89 F.3d 1156 (4th Cir.1996) (holding that ERISA does not preempt a legal malpractice claim against an attorney concerning his representation of an employee benefit plan because the claim does not affect "the structure, the administration, or the type of benefits provided by the ERISA plan").[5]

In this case, Lewis's claim involves none of the ERISA concerns, and his claim clearly falls within the persuasive holdings in Pizlo, Hospice, and the myriad of federal district court cases. Lewis's action does not raise the potentiality of conflicting regulation of an ERISA plan. Lewis does not attempt to subject the plan or its

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[5] In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), the United States Supreme Court held that ERISA preempted an employee's claim that, four months before his benefits vested, his employer fired him with the express purpose to avoid "contributing to or paying [employee] benefits." However, Ingersoll-Rand is distinguishable from the present case. In Ingersoll-Rand, the preempted claim was that the employer's principal reason for termination was to prevent vesting of benefits. The Supreme Court held the claim was preempted partly because an action pursuant to ERISA § 510 already exists for "interfering with [the] attainment of any right ... under the plan." *Ingersoll-Rand*, 498 U.S. at 142-43, 111 S.Ct. at 485. However, Lewis does not allege that the union's activities were for the express purpose of preventing him from claiming his benefits; thus, his action does not fall within either the Ingersoll-Rand rule or ERISA § 510. See *Howard v. Indiana Michigan Power Co.*, 812 F.Supp. 135, 137-38 (S.D.Ind.1992); *Tippett v. Old Kent Bank*, 134 F.R.D. 159, 160-61 (W.D.Mich.1991) (both cases distinguishing Ingersoll-Rand on this basis, in employee claims for lost pension benefits as damages). Unlike Ingersoll-Rand, the court's inquiry in this case does not have to be directed toward the plan as to whether the union had a legitimate or pension-defeating motive. Finally, Ingersoll-Rand was decided before the Supreme Court's narrowing of ERISA preemption in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). After *Travelers*, I do not think the Supreme Court would extend Ingersoll-Rand to the present situation.

administrator to any liability, and he does not allege any conduct "which relates to the administration of the plan, to the processing of any covered claim, or which impinges on [his] ERISA rights." *Hospice*, 944 F.2d at 755. He does not claim that, pursuant to the plan, he is a beneficiary who was unfairly prevented from claiming his benefits. Instead, Lewis claims that Local 382 of the [324 S.C. 439] IBEW unlawfully attempted to prevent him from working for United Electrical, Inc., and that, merely as a result, Lewis lost his membership and pension benefits. Lewis does not deny that he is no longer a beneficiary under the terms of the union's pension plan. Thus, there is a distinction between one who claims as an actual beneficiary under an employee benefit plan, and one who claims as a nonbeneficiary "whose damages might be measured by the plan's formula." *Howard*, 812 F.Supp. at 137. Moreover, these damages will be paid by the local union in a one-time lump-sum payment, and not by the plan in pension-style monthly installments. For the foregoing reasons, I would hold that Lewis's right to work claim is not preempted by ERISA.

III. RIGHT TO WORK ACT

The majority holds that the right to work act cannot be interpreted broadly enough to encompass Lewis's claim. I disagree pursuant to the South Carolina Supreme Court's precedent in *Layne v. International Bhd. of Elec. Workers, Local 382*, 271 S.C. 346, 247 S.E.2d 346 (1978). *Layne* involved an extraordinarily similar factual situation in which a former union member claimed he lost "the benefit of monies paid [the union] over thirty-five years" because the union expelled him for working on a job with non-union members.[6] *Layne* clearly held that *Layne* stated a cause of

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[6] The *Layne* court interpreted *Layne's* claim of damage as "inferentially the loss of the expectancy of drawing retirement benefits...." *Layne*, 271 S.C. at 349, 247 S.E.2d at 348.

action pursuant to the right to work act. Id. Admittedly, *Layne* held that the tortious violation was the "attempt to coerce the plaintiff from engaging in the particular employment by means of threatening his expected retirement benefits."[7] Id. at 350, 247 S.E.2d at 348. However, even if *Layne* is read as suggested by the majority, and even if Lewis did not have a vested interest in the pension benefits, there was certainly "intimidation ... directed against [Lewis's] person or property" in the union's actions and fine of $2,000 levied against him. S.C.Code Ann. § 41-7-70 (1986). In any event, *Layne* does not hold that a threatening of vested benefits is necessary in order for a plaintiff to state a right to work tort; in fact, the court refers to *Layne's* "expectancy of retirement benefits." *Layne*, 271 S.C. at 350, 247 S.E.2d at 348. Therefore, I would hold that Layne clearly supports Lewis's cause of action pursuant to the right to work act.

IV. CONCLUSION

I would hold that neither the LMRA nor ERISA preempts Lewis's claim. I would further hold that Lewis stated a cause of action pursuant to the South Carolina Right to Work Act. Thus, I would affirm the jury's verdict against the local union.

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[7] As noted before, termination of an employee or union member for the express purpose of preventing the vesting of benefits might be preempted under *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). However, there is an obvious difference between the Ingersoll-Rand -type situation of a primary motive to terminate someone in order to prevent vesting, and the Layne-type situation of attempting to use pension benefits as leverage in order to achieve compliance with union rules or decisions. The former situation involves an economic decision to avoid ultimately having to pay benefits by firing shortly before vesting; however, in the latter situation the union or employer ordinarily would not care if a compliant beneficiary obtained his benefits. Therefore, even Layne 's statement of that case's tort is not preempted.

JUDGMENT ON TRIAL OR ORDER BY THE COURT

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
COURT OF COMMON PLEAS)

CASE NO. 91-CP 32-2734

Michael O. Lewis as Per Rep. of etc.
Plaintiffs,

vs.

Local 382 International Brotherhood of Electrical Workers ET AL.

Defendants.

ENTERED: APRIL 14, 1995

IT IS ORDERED AND ADJUDGED:

(✓) SEE ATTACHED ORDER

DATED AT LEXINGTON, SOUTH CAROLINA, THIS 14 DAY OF Apr, 1995.

/s/ Thomas H. Centerford/Mhf
CLERK OF COURT

THIS JUDGMENT WAS ENTERED ON THE 13 DAY OF Apr, 1995. AND A COPY MAILED FIRST CLASS THIS 14 DAY OF Apr. 1995.

TO ATTORNEYS OF RECORD OR TO PARTIES (WHEN APPEARING PRO SE) AS FOLLOWS:

/s/Scott Elliott
Attorney(s) for Plaintiff(s)

/s/Terry R. Hellig
Attorney(s) for Defendant(s)

LCF 583 Amended 2/22/95

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

MICHAEL O. LEWIS, as Personal Representative of the Estate of N.G. Lewis, Deceased,
Plaintiff,

-vs-

LOCAL 382, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL-CIO), DAVIS SELF, LARRY POOLE, JEROME JENKINS, DORIS M. JONES, BILL DAVIS, JOHN C. DAVIS, AND RONALD GOODALE,
Defendants.

CASE NUMBER: 91-CP-32-2734

ORDER DENYING DEFENDANT'S POST-TRIAL MOTIONS AND AFFIRMING THE AWARD OF PUNITIVE DAMAGES

ENTERED: APRIL 13, 1995
FILED: APRIL 13, 1995

This case was brought under the South Carolina Right to Work Law and an outrage claim. After being remanded to state court by the Honorable Matthew J. Perry, a jury awarded actual and punitive damages against Local 382 of the International Brotherhood of Electrical Workers (IBEW) on the right-to-work claim. The defendants made post-trial motions for JNOV, remittitur, new trial absolute, new trial *nisi*, and reduction of the punitive damages.

These matters and the mandatory post-trial review of punitive damages, have been under advisement for a very

extended period of time because of misunderstandings by the court about the status of the matter, and deep concerns about the legal issues involved and the conduct of the trial. While many of those concerns still exist, the court denies the post-trial motions and approves the punitive damage award.

This case involves complex issues regarding the relationship of the Right to Work Law to federal preemption requirements under the Labor Management Relations Act (LMRA) and the Employee Retirement Income Security Act (ERISA). It also involves questions about the impact of a federal court's order of remand in a case involving these issues.

N.G. Lewis was a union worker for over thirty-eight (38) years. In 1986, the majority of workers at his place of employment voted that the IBEW would not be their exclusive bargaining agent. The IBEW declared the employer "in difficulty" and notified its members that their union membership could be in jeopardy if they continued working for that employer. Lewis continued to work for the company, so another member filed charges against him. On February 13, 1987, the union imposed a fine which would be suspended if Lewis used the union's referral procedures and quit working for the company within thirty (30) days. Lewis did not pay the fine, and his membership dues lapsed. He was dropped as a member of the union for non-payment of dues.

The IBEW Constitution provides that non-members forfeit any pension or death benefits payable from the Pension Benefit Fund. Lewis lost those benefits and this suit followed.

The court has carefully reviewed the detailed information submitted by the attorneys, including updates on recent developments in the law. The parties and counsel have been extremely patient and helpful to the court while it has wrestled with these matters. After thorough consideration, the court deems it sufficient to forego the specificity reflected in the proposed orders submitted and

simply deny the post-trial motions. The verdict is supported by the evidence .

As for the punitive damage award, the court has conducted a review of the factors under Gamble v. Stevenson, 305 S.C. 104, 406 S.E. 2d 350 (1991). The jury awarded actual damages of Eighty-Two Thousand Five Hundred Sixty & No/100 ($82,560.00) Dollars and punitive damages of Twenty-Five Thousand & No/100 ($25,000.00) Dollars against the IBEW. The jury found for the IBEW on the outrage claim and found for the individual defendants on both causes of action.

Gamble dictates that the court review the award of punitive damages to evaluate it in light of the following factors: the defendant's degree of culpability, the duration of the conduct, the defendant's awareness or concealment, the likelihood that the award will deter the defendant or others from similar conduct, whether the award bears a reasonable relationship to the harm, the defendant's ability to pay, and other appropriate factors.

The evidence indicated that the IBEW was a primary actor, and that it acted with full knowledge of the potential impact on the plaintiff. The conduct occurred over an extended period of time and involved hearings, notifications, correspondence, and implementation of policy which demonstrated awareness by the union of its actions. There was never any question about the IBEW's knowledge of the Right to Work Law.

The jury assessed considerable punitive damages, much in the nature of a fine or penalty which should gain the attention of the IBEW and others similarly situated, without in any way strapping the financial resources of the union. The court is aware of one prominently displayed newspaper article published about the verdict in a major state newspaper.

Since the suit was based on a denial of benefits, and the jury apparently found that the IBEW improperly used force to affect the work choice of a South Carolina citizen,

the court finds a reasonable relationship to the harm. The court notes that the punitive damages were far less than the actual damages assessed.

Finally, as previously noted, the court has been very concerned about the conduct of the trial. One concern was the use of an "us versus them" closing argument, to which no objection was raised. Obviously, those arguments and other similar tactics based on regionalism or anti-unionism invite a verdict which is the result of bias, prejudice, or whim, both as to actual and punitive damages. After carefully reviewing this case and the verdicts reached, the court is convinced that the jury did not accept that invitation, but did its best to fairly apply the law as charged.

The court denies the post-trial motions and determines that the award of punitive damages is proper within the parameters of Gamble and other case law. Judgment shall be entered against the Local 382 of the IBEW in the amounts awarded by the jury.

AND IT IS SO ORDERED.

/s/William P. Keesley
Judge, 11th Judicial Circuit

Edgefield, South Carolina
April 10, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

N. G. LEWIS,
Plaintiff,

-vs-

LOCAL No. 382, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, (AFL-CIO), DAVIS SELF, LARRY POOLE, JEROME JENKINS, DORIS M. JONES, BILL DAVIS, JOHN C. DAVIS, and RONALD GOODALE,
Defendants.

CIVIL ACTION NO. 3:89-1361-0

ENTERED: AUGUST 9, 1989
FILED: AUGUST 9, 1989

ORDER

This matter is before the Court upon the motion of the defendants to set aside the entry of default which was entered on June 26, 1989. Upon consideration of the motion, the arguments thereon and for good cause, the motion is hereby granted.

Also, the plaintiff seeks an order remanding the case to the state court from which it was removed, upon the ground that removal was improvident. The Court agrees. Therefore, upon consideration of the matter and for good cause shown, this case is hereby remanded to the Court of Common Pleas for Lexington County, South Carolina.

IT IS SO ORDERED.

/s/_____

Matthew J. Perry
UNITED STATES DISTRICT
JUDGE

Columbia, South Carolina,
August 9, 1989.

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O.BOX 11330
COLUMBIA, S.C. 29211
(803) 734-1080

August 17, 1999

Henry Hammer, Esquire
Howard Hammer, Esquire
Hammer, Hammer, Carigg & Potterfield
P.O. Box 1421
Columbia, SC 29202

Scott A. Elliott, Esquire
Elliott & Elliott, PA
721 Olive Street
Columbia, SC 29205

Re: Lewis, Michael O. v. Local 382

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

/s/Ernest A. Finney, Jr. C.J.
/s/Jean H. Toal A.J.
/s/James E. Moore A.J.
/s/John H. Waller, Jr. A.J.
/s/E.C. Burnett, III A.J.

August 17, 1999."

The remittitur in this matter is today being forwarded to the Clerk of Court for Lexington County.

THE SOUTH CAROLINA COURT OF APPEALS

POST OFFICE BOX 11629
COLUMBIA, S.C. 29211

1015 SUMTER STREET
COLUMBIA, S.C. 29201
(803) 734-1890

KENNETH A. RICHSTAD
CLERK
IDA R. CARSON
DEPUTY CLERK

February 21, 1997

Henry Hammer, Esquire
Messrs, Hammer, Hammer, Carrigg & Potterfield
P.O. Box 1421
Columbia, South Carolina 29202

Re: Michael O. Lewis, etc. v. Local 382, International Brotherhood of Electrical Workers (AFL-CIO), et al. (Opinion 2573)

Dear Mr. Hammer:

Your Petition for Rehearing has been denied in the following Order:

"Petition for Rehearing denied.

/s/C. Tolbert Goolsby, Jr., J.
/s/Ralph King Anderson, Jr., J.

I would grant.

/s/Jasper M. Cureton _____, J.

Columbia, South Carolina
February 21, 1997."

The Remittitur will be held for a period of thirty days until the time to Petition for Writ of Certiorari has expired, after which it will be forwarded to the trial court.

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S.C. Court of Appeals, in the amount of $7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be destroyed.

Sincerely,

/s/_____
Kenneth A. Richstad
Clerk

KAR/jsc
cc: The Honorable Clyde N. Davis, Jr.
Herbert E. Buhl, III, Esquire
Terry R. Yellig, Esquire
Howard Hammer, Esquire
Scott Elliott, Esquire

THE SOUTH CAROLINA COURT OF APPEALS

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KENNETH A. RICHSTAD
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February 21, 1997

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P.O. Box 1421
Columbia, South Carolina 29202

Re: Michael O. Lewis, etc. v. Local 382, International Brotherhood of Electrical Workers (AFL-CIO), et al. (Op. 2573)

Dear Mr. Hammer:

Your Suggestion for Rehearing en banc has been denied in the following Order:

"En Banc Denied.

/s/William T Howell, C. J.
/s/Jasper M Cureron, J.
/s/C. Tolbert Goolsby, Jr., J.
/s/Carol Connor, J.
/s/Kaye Hearn, J.
/s/Ralph King Anderson, Jr., J.

/s/H. Samuel Stilwell, J.
/s/William L. Howard, J.

Judge Thomas E. Huff not participating.

Columbia, South Carolina
February 21, 1997."

/s/Kenneth A. Richstad
Clerk

KAR/jsc
cc: Herbert E. Buhl, III, Esquire
Terry R. Yellig, Esquire
Howard Hammer, Esquire
Scott Elliott, Esquire
The Honorable Clyde N. Davis, Jr.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael O. Lewis, As Personal Representative of the Estate of N. G. Lewis, Deceased,

Petitioner,

v.

Local 382, International Brotherhood of electrical Workers (AFL-CIO), Davis Self, Larry poole, Jerome Jenkins, Doris M. Jones, Bill Davis, John C. Davis and Ronald Goodale,

Defendants,

Of Whom Local 382, International Brotherhood of Electrical Workers (AFL-CIO) is,

Respondent.

PETITION FOR RE-HEARING

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Opinion No. 24965
Heard 12/15/98-Filed 07/12/99

SUMMARY OF REASONS FOR GRANTING PETITION FOR REHEARING

This court, in affirming the majority opinion of the Court of Appeals, reported in 324 S.C. 412, 481 S.C. 2d 135, (Ct. App. 1997) overlooked or misapprehended that:

1. The U.S. District Judge at the hearing of the Motion to Remand asserted jurisdiction of the case and considered and decided on the merits the Union's Motion to Set Aside the entry of default against it, the preemption

issue, and in the exercise of his discretion remanded the pendent state law issue of whether the Union violated the Right to Work Act to the state court. Consequently, the decision on the issue of preemption was reviewable on appeal and thus preclusive as decided by the trial judge. Quackenbush v. Allstate Insurance Company, 574 U.S. 716, 116 S.Ct. 1712 (1994); Carnegie-Mellon University v. Cohill, 484 U.S. 343; 108 S.Ct. 614 (1988); Executive Software North America , Inc. v. U.S. District Court, 24 F 3d 1545, 1549, 1559 (1993).

2. The right and remedy granted to a Union member under a state public interest statute enacted to effectuate a legislative policy is non-negotiable and can not be waived by contract or membership in a labor organization. Brooklyn Sovinges Bank v. O'Neill, 324 U.S. 697, 65 S.Ct. 895, 902 (1945).

3. As acknowledged in the opinion of the U.S. District Court and the Court of Appeals, and as expressed by this Court, "This is an action for an alleged violation of the South Carolina Right to Work Act," and as asserted by Lewis' counsel in the Motion to Remand, supported by state and federal decisions, to which the federal judge agreed "this is not a suit to recover benefits under the terms of a plan or to clarify Plaintiff's rights under the terms of the plan as provided in 29 U.S. 1132(a)(1)."

4. Reference to a pension plan is only incidental to Lewis' action under the South Carolina Right to Work Act, is referred to merely as a measure of damages, and is too tenuous, remote and peripheral to preempt state law touching interests deeply rooted in local feeling and responsibility. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, footnote 12 at 1885 (1998); Allis Chalmers v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 1912 (1995); Pizlo v. Bethlemen Steel Corporation, 884 F.2d 116 (4th Cir. 1989).

5. § 301 does not grant to the parties to a collective bargaining agreement, and by extension of 29

U.S.C. 413 to a union and its members under a union constitution and its by-laws, the right or liberty to contract for what is illegal under state law, which would be inconsistent with congressional intent to preempt state rules that proscribe or establish rights and obligations of a labor contract. Allis Chalmers v. Lueck, supra.

6. Layne v. International Brotherhood of Electrical Workers, Local 382, 271 S.C. 346, 247 S.E.2d 346 (1978), virtually identical to the facts herein holding that the South Carolina Right to Work Act is not preempted under 29 U.S.C. 413, is not distinguishable from the instant case.

7. Congress itself has carved out exceptions to preemption applicable here by enactment of 29 U.S.C. 413 and 28 U.S.C. 164. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967).

8. The U.S. Supreme Court has refused to hold state remedies pre-empted where the activity regulated was merely of a peripheral concern of the Labor Management Relations Act or, as here, touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, the court could not infer that Congress has deprived the state of the power to act. Vaca v. Sipes, supra.

9. In determining the preemption issue under ERISA, the starting presumption is that Congress does not intend to supplant State law and the burden of overcoming this presumption is considerable, and further, the words "relate to" should be viewed and interpreted in a narrow sense and not in a broad sense. DeBuono v. N.Y.S.R.-ILA Medical and Clinical Services, ____ U.S. ____, 117 S.Ct. 1747 (1997).

10. Lewis' remedy under the South Carolina Right to Work Act is in plain and unambiguous language, without need of interpretation and in no way is substantially or inextricably intertwined with the provisions of any labor agreement, either under LMRA, LMRDA, ERISA, or the union constitution or it by-laws.

11. The sound syllogistic, logical and well reasoned dissenting opinion of Judge Cureton clearly demonstrates that in accordance with applicable federal and state law principles, neither LMRA nor ERISA preempts Lewis' cause of action. Lewis v. International Brotherhood of Electrical Workers Local 382, 324 S.C. 412, 481 S.E. 2nd 135, 145-150 (Ct. App. 1996).

12. The issue relating to attorneys' fees is still not moot. It is expected to remain pending until the time for applying to the U.S. Supreme Court for certiorari expires, and if certiorari should be applied for, then continued pending final disposition by the U.S. Supreme Court.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael O. Lewis, As Personal Representative of the Estate of N.G. Lewis, Deceased,

Petitioner,

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Defendants,

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PETITION FOR RE-HEARING

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Opinion No. 24965
Heard 12/15/98-Filed 07/12/99

PETITION FOR REHEARING

The Petitioner, Michael O. Lewis, as Personal Representative of the Estate of N.G. Lewis, deceased, respectfully prays that this Court grant a rehearing of its decision filed July 12, 1999, affirming in result the majority opinion of the South Carolina Court of Appeals, reported in 324 S.C. 412, 481 S.E.2d 135 (Ct. App. 1997) on the following grounds:

I.

This Court affirmed the majority opinion of the Court of Appeals holding that the federal court order of U.S. District Judge Perry is not preclusive on the issue of preemption because "it is impossible to determine for certain the basis of the federal court's remand as it merely states removal was improvident." This Court noted that the remand order did not specify as grounds for remand either lack of jurisdiction or defects in the removal procedure. In the absence of such specification, this Court overlooked or misapprehended that the remand order was reviewable on appeal, and therefore preclusive on the issue of preemption in accordance with the authority of Quackenbush v. Allstate Insurance Company, 574 U.S. 706, 116 S.Ct. 1712 (1994). See Things Remembered, Inc. v. Petarca, 516 U.S.116, 116 S.Ct. 494, at 498 (1995) holding that the language to the contrary in Nutter v. Monongahela Company, 4 F.3d.319 (4th Cir. 1993) is dicta.

Moreover, reference to the motions hearing before Judge Perry after the case was removed to federal court eliminates any possibility that the remand order was issued pursuant to 28 U.S.C. 1447 (c). After removal, Judge Perry asserted subject matter jurisdiction to decide the issues before him, to wit, (1) the motion of the Union to Set aside an entry of default against the Union; (2) the issue of whether Lewis' action was preempted; and (3) Lewis' motion to remand. After hearing extensive argument by counsel for the respective parties, Judge Perry assumed jurisdiction and thereafter granted the Union's motion to set aside the entry of default, agreed with and embraced Lewis' argument that his action was not preempted, and finally, exercising his discretion, remanded to the state court for trial the pendent state law claim for violation of the South Carolina Right to Work Act. Carnegie- Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614 (1988); Executive

Software North America, Inc. v. U.S. District Court, 24 F.3d 1545, 1549, 1554 (1993).

As heretofore stated, the remand order was thus reviewable on appeal and preclusive on the issue of preemption. Accordingly, the Union is precluded from once again litigating the ruling of the Federal Court on the motion to remand, the ruling of the Circuit Court on the post trial motions and the judgment of the Circuit Court entered on the findings of the jury, unchallenged on appeal, that the Union violated by force, intimidation and threats the South Carolina Right to Work Act in interfering or attempting to interfere with the exercise of Lewis' non-negotiable right to engage in lawful employment.

II.

This Court, in holding that Lewis' claim was preempted under LMRA, adopted the majority Court of Appeals' finding that Lewis' claim was substantially dependent upon an analysis of the Union constitution because interpretation of the Constitution was essential to a determination of whether Lewis had any property rights in the pension benefit fund.

In holding that Lewis' claim was preempted and in adopting the majority Court of Appeal's finding, this Court overlooked or misapprehended that Lewis did not and could not claim any benefits in a pension which had not vested, and further overlooked that the findings of the Court of Appeals were without evidentiary support, based solely on the conclusory allegations of the Union.

The Court further overlooked or misapprehended that Lewis did not bring this action for pension benefits nor did he claim that the Union's conduct was motivated to evade the payment of pension benefits. Nor did he bring this action against the pension fund, its trustees and administrators which would have been required if he had been seeking damages for pension benefits or claiming that

the Union was motivated to evade a payment of his pension benefits. As asserted by Lewis' counsel on the motion to remand, supported by decisions of state and federal courts with which Judge Perry agreed, "this is not a suit to recover benefits under the terms of a plan or to clarify Plaintiff's rights under the term of a plan as provided by 29 U.S.C. 1132 (a) (1)."

There is no evidence that his claim would substantially affect the pension fund or potentially alter the criteria for receipt of benefits. His claim for damages was for mental anguish, humiliation, emotional distress and other emotional ills and for the loss of the value or costs of the monies he paid to the Union over the years he was a member for the expectancy of benefits. The benefits are referred to only as a measure of Lewis' damages as pointed out by Judge Cureton in his dissent, Lewis v. International Brotherhood of Electrical Workers Local 382, 324 S.C. 412, 481 S.E. 2nd 135, 145-150, in accordance with the authority of Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, footnote 12 at 1885 (1988) which reads:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in sate-law suit is entitled. See Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp., 814 F.2d, at 106. Although federal law would govern the interpretation of the agreement to determine the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted. As we said in Allis

> Chalmers Corp. v. Lueck, 471U.S., at 211, 105 S.Ct., at 1911, "not every dispute... tangentially involving a provision of a collective-bargaining agreement, is pre-empted by 301..."

Moreover, since the findings of fact that the Union violated the S.C. Right to Work Act by the use of force, intimidation and threats, as found by the jury, and as ruled upon by the trial judge on the post trial motions are unchallenged on appeal, this Court overlooked or misapprehended the decision of the United States Supreme Court in Allis Chalmers, Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 1912 (1995) holding:

> [c]learly § 301 does not grant to the parties to a collective bargaining agreement[1] the ability to contract for what is illegal under state law. In extending § 301 beyond suits for breach of contract, it would be inconsistent with Congressional intent under that Section to preempt state rules that proscribe conduct or establish rights and obligations of a labor contract.

The gravaman of Lewis' action was not for the Union's attempt to evade payment of pension benefits, but his action clearly was for violation of the South Carolina Right to Work Act against the Union for interfering or attempting to interfere by the use of force, intimidation or threats with the exercise of Lewis' right to engage in lawful

---

[1] Constitutions and by-laws of a labor organization fall within the same category as collective bargaining agreements by LMRDA 29 U.S.C. 411 et seq., an Amendment to LMRA and Wooddell v. International Brotherhood of Electrical Workers, Local 71, 502 U.S. 93, 112 S.Ct. 494(1991).

employment, a right totally independent of and in no way inextricably intertwined with the provisions of a labor agreement, or the Union Constitution, or its by-laws. His action under the Right to Work Act, at best, is remote, tenuous and of peripheral concern to ERISA, LMRA or to any analysis of the Union Constitution or its by-laws. Allis Chalmers, Corp. v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 1912 (1995); DeBuono v. N.Y.S.R.-ILA Medical and Clinical Services, ____U.S.__, 117 S.Ct. 1747 (1997); Lingle v. Norge Division of Magic Chef, Inc. 486 U.S. 399, 108 S.Ct. 1877 (1988).

This Court further overlooked or misapprehended that as found by the U.S. District Judge and the trial judge, and as expressed by the Court of Appeals and as also stated in the opinion of this Court "Lewis brought this action seeking damages for violation of the South Carolina Right to Work Act, S.C. Code Ann. §§ 41-7-10 through 90 (Rev. 1986 & Supp 1997)."

III.

A. This Court, in seeking to distinguish Layne v. International Brotherhood of Electrical Workers, Local 382, 271 S.C. 346, 247 S.E.2d 346 (1978) as not applicable to support Lewis' claim, reasons that § 413 of LMRDA, (29 U.S.C.413), an exception to preemption carved out by Congress, is limited to "the subchapter of LMRDA §411(c)(5) which deals with due process measures a Union member must be afforded prior to being disciplined.

In so reasoning, this Court overlooked or misapprehended that the exception to preemption carved out by Congress is not limited to any one portion of 29 U.S.C. 411 et seq., but rather applies in plain and unambiguous language, without need of interpretation, to preserve Petitioner's rights and remedies afforded him under the South Carolina Right to Work Act. Section 413 as applicable here reads:

> Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal or under the constitution and by-laws of any labor organization.

B. This Court also reasons that Layne is not applicable because to apply provisions of 29 U.S.C. 413 to these facts would "completely eviscerate" the preemption provisions of §301 of the L.M.R.A. In so reasoning, the Court overlooked or misapprehended that the application of § 413 is limited to preserving those rights and remedies of labor union members where, as here, such rights and remedies are granted in the public interest to effectuate legislative policy and are not negotiable.

C. This Court also reasons that Layne is not applicable because the issue of § 301 preemption was not raised in Layne. While this Court acknowledges that Wooddell v. International Brotherhood of Electrical Workers, Local 71, 502 U.S. 93, 112 S.Ct. 494 (1991) extends the preemption provision of the LMRA (§ 301) to actions between a Union member and his union, the Court overlooked that § 413 is an amendment to and an extension of § 301. The § 413 preemption issue was obviously raised and addressed by the South Carolina Supreme Court in deciding Layne, virtually identical to the action sub judice, holding that the Right to Work Act was not preempted by federal law, and nothing appears therein to the contrary.

D. This Court, in holding that Layne is not applicable, overlooked or misapprehended the sound syllogistic, logical and well reasoned dissenting opinion of Judge Cureton in holding that "Layne clearly supports Lewis' cause of action pursuant to the Right to Work Act," also citing in support thereof the Fourth Circuit in Pizlo v. Bethlehem Steel Corporation, 884 F 2d. 116 (4th Circuit 1989) and other federal cases, as to which this Court states

"We are not persuaded by this authority." Apparently, this Court overlooked or misapprehended the authority of the United Supreme Court in Lingle, infra, referred to in this Petition under II above.

IV.

This Court, in affirming the decision of the majority Court of Appeals, adopted its holding that Lewis' claim was preempted by §514(a) of ERISA as his claim for damages "related to" an employee benefit plan within the scope of ERISA, and the resolution of Lewis' claim directly affected the pension fund as it directly alters the criteria for the receipt of benefits, and, further, that it is inescapable that Lewis' claim is predicated upon the existence of IBEW pension plan.

In so adopting the holding of the majority Court of Appeals, this Court overlooked that the holding was without evidentiary support in the record and was obviously based upon the conclusory allegations of the Union.

As noted by Judge Cureton in his dissent, Lewis' claim was not predicated upon the existence of the IBEW pension plan. It was predicated upon the South Carolina Right to Work Act for violation thereof by the conduct of the Union interfering and attempting to interfere by the use of force, intimidation and threats or violent or insulting language directed against Lewis, his family or his property in the exercise of Lewis' non-negotiable right to engage in lawful employment. There is nothing in the record showing that Lewis' claim would directly affect the administration of benefits under the plan. The pension trust itself is not liable, and neither the administrators of the plan nor the plan itself would be liable or burdened in any way.

In holding that Lewis' claim is preempted by ERISA, this Court overlooked or misapprehended the rationale of the recent decision of the United States Supreme Court in DeBuono v. N.Y.S.R.-ILA Medical and Clinical Services,

____U.S.__, 117 S.Ct. 1747 (1997). There, the United States Supreme Court held that in determining whether the preemption doctrine is applicable under ERISA, the words "relate to" should be narrowly and not broadly interpreted when considering the preemption doctrine in a field traditionally occupied by the states -- the regulation of health, welfare and safety. Clearly, there is nothing in the South Carolina right to Work Act that is the type of state law that Congress intended ERISA to supervise.

Moreover, this Court overlooked that in deciding the preemption issue, the "starting presumption [is] that Congress does not intend to supplant state law" and that the burden of overcoming this presumption is considerable. DeBuono v. NYSA-ILA Medical and Clinical Services, 117 S.Ct. 1747, 1752. Overlooking the rationale of DeBuono, this Court relied instead on the South Carolina case of Baker Hospital v. Isaac, 301 S.C. 248, 391 S.E.2d 549 (1996), an action not involving a non-negotiable public interest right which "recognized that the pre-emptive effect is a broad one." Thus, applying Baker contrary to DeBuono, this Court interpreted the words "relate to" in a broad sense in reaching its decision. Further, notwithstanding that the Court recognized that "those State actions which affect employee benefit plans in 'too tenuous, remote or peripheral a manner'" do not relate to the plan, this Court nevertheless overlooked this principle in deciding that the preemption doctrine was applicable here.

V.

In affirming the decision of the Court of Appeals, this Court in its opinion states that it was unnecessary for the Court of Appeals to have addressed the issue of whether Lewis had stated a cause of action as the conduct that Lewis complained of did not constitute a violation of the Right to Work Act.

As heretofore contended, Lewis' action was not preempted. Not only did Lewis state a cause of action under the Right to Work Act, but the jury also found that the Respondent Union violated the Right to Work Act, a finding unchallenged on appeal.

VI.

In affirming the majority decision of the Court of Appeals, this Court overlooked or misapprehended, as stated by Judge Cureton in his dissent, that "the right to work statute can not be superseded by agreement, the rights therein are non-negotiable." To the same effect see Brooklyn Savings Bank v. O'Neill, 65 S.Ct. 895 (1945) (holding that where a private right is granted in public interest to effectuate legislative policy, waiver so involved with public interest will not be allowed where it could thwart public policy which it is designed to effectuate")

VII.

In affirming the majority decision of the Court of Appeals this court apparently overlooked or misapprehended that in conflict with federal law, it was granting the Union the liberty of violating the South Carolina Right to Work Act by the use of force, intimidation and threats to interfere and attempt to interfere with the exercise of Lewis' rights to engage in lawful employment. Allis Chalmers, Corp. v. Lueck, supra.

VIII.

In affirming the majority decision of the Court of Appeals, this Court overlooked that the South Carolina Right to Work Act is of compelling state concern, touching interests so deeply rooted in local feeling and responsibility that in the absence of compelling Congressional direction it

can not be inferred that Congress had deprived the States of the Power to Act, Allis Chalmers, Corp. v. Lueck, supra and Vaca v. Sipes, supra.

IX.

The majority decision of the Court of Appeals is in direct conflict with the rationale and principles enunciated by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 911, (1967) and the cases cited therein, holding that:

> [t]his pre-emption doctrine, however has never been rigidly applied to cases where*** Congress itself has carved out exceptions to the Board's exclusive jurisdiction***
> ***
> [i]n addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted "where the activity regulated was merely a peripheral concern of the Labor Management Act. ***[or] touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.

See 29 U.S.C. 413 and 29 U.S.C. 164 as evidence of Congressional intent to carve out exceptions of preemption of state laws touching interests deeply rooted local feeling and responsibility.

X.

In affirming the majority decision of the Court of Appeals, this Court overlooked that federal law does not preempt under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185, as amended by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 411, et seq., or under § 514 (a) of the Employee Security Act (ERISA), 29 U.S.C. 1144 (a), state remedies touching interests so deeply rooted in local feeling and responsibility that it cannot be inferred that Congress has deprived the States of the power to act. Vaca v. Sipes, supra, DeBuono v. N.Y.S.R.-ILA Medical and Clinical Services, supra, Lingle v. Norge Division of Magic Chef, Inc., supra, Allis Chalmers, Corp. v. Lueck, supra; 29 U.S. C. 413; 29 U.S.C. 164.

XI.

This Court concluded that the issue with respect to an award to Petitioner of attorney fees was now moot. However, the issue relating to attorneys' fees is still not moot. It is expected to remain pending until the time for appealing to the U.S. Supreme Court for certiorari expires, and if certiorari should be applied for, then continued pending final disposition by the U.S. Supreme Court.

Respectfully submitted,

HAMMER, HAMMER, CARRIGG
& POTTERFIELD

BY: _____

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Dated: July 27, 1999

ATTORNEYS FOR PETITIONER

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

N.G. LEWIS, by P.R.
Plaintiff,

-vs-

LOCAL 382 of the IBEW, DAVIS SELF, DORIS M. JONES, & RONALD GOODALE,
Defendants.

91-CP-32-2734R

FORM OF VERDICT
As To Defendant
Local 382 of the IBEW

I. RIGHT TO WORK

We find for the Defendant.

_____
Foreperson

OR

We find for the Plaintiff _____dollars actual damages.

_____
Foreperson

OR

We find for the Plaintiff eighty two thousand five hundred and sixty dollars plus court costs dollars actual damages and twenty five thousand dollars punitive damages.

/s/Pamela L. Phillips
Foreperson

6-18-93

Date

Lexington, South Carolina

IN THE UNITED STATES DISTRICT COURT
COLUMBIA DIVISION OF SOUTH CAROLINA

N.G. LEWIS,
Plaintiff,

vs.

LOCAL UNION 382, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, et al.,
Defendants.

CASE NO. 3:89-1361-01

ANSWER

COMES NOW the defendants, and answers the complaint of the plaintiff as follows:

1. Admitted upon information and belief.
2. Admitted upon information and belief.
3. Admitted upon information and belief.
4. It is admitted that plaintiff became a member of Defendant Local Union in 1948 and that he remained a member until 1986. Except as herein admitted, all allegations contained in paragraph 4 of plaintiff's complaint are denied.
5. The allegations contained in Paragraph 5 of the complaint are explicitly denied.
6. The allegations contained in Paragraph 6 of the complaint are explicitly denied.
7. The answers to the allegations contained in Paragraph 1 through 6 of the complaint are realleged as if fully set forth herein.

8. The allegations contained in Paragraph 8 of the complaint are explicitly denied.

9. The answers to the allegations contained in Paragraphs 1 through 8 of the complaint are realleged as if set forth herein.

10. The allegations contained in Paragraph 10 of the complaint are explicitly denied.

11. The allegations contained in Paragraph 11 of the complaint are explicitly denied.

AND FOR A FIRST FURTHER ANSWER AND DEFENSE to plaintiff's complaint, defendants say and allege:

12. This action has been brought beyond the applicable Statute of Limitations.

AND FOR A SECOND FURTHER ANSWER AND DEFENSE to plaintiff's complaint, defendants say and allege:

13. The allegations in plaintiff's complaint fail to state a claim upon which relief can be granted, and should therefore be dismissed pursuant to Rule 12 of the Federal Rules of Civil Procedure.

WHEREFORE, defendant respectfully pray the court as follows:

1. That plaintiff recover nothing of defendant and that this action be dismissed;

2. That the costs of this action, including a reasonable attorney's fee, be taxed against plaintiff;

4. For such other and further relief as to the Court may seem just and proper.

This the 28th day of June, 1989.

/s/LARRY L. EUBANKS
Attorney for the Defendants
Suite 300, BB&T Building
8 West Third Street
Winston-Salem, NC 27101
Telephone: (919) 723-0741

IN THE UNITED STATES DISTRICT COURT
COLUMBIA DIVISION OF SOUTH CAROLINA

N. G. Lewis,
Plaintiff,

vs.

Local No. 382, International Brotherhood of Electrical Workers (AFL-CIO, et al.,
Defendants.

Case No. 3:89-1361-01

MOTION TO REMAND

Plaintiff moves the Court for an Order remanding this cause to the Court of Common Pleas for Lexington County, South Carolina, on the ground that this action is brought, not under federal law, but solely under state law on three causes of action arising out of violation by Defendants of the South Carolina Right to Work Act, resulting in termination of union membership, for which the Plaintiff seeks damages for mental anguish, humiliation, extreme emotional distress, loss of future benefits and the costs of purchasing same, and thus the case was improperly removed from the Court of Common Pleas for Lexington County.

HOWARD HAMMER, P.A.
1019 Assembly Street
Columbia, South Carolina 29201

SCOTT ELLIOTT
Post Office Box 607
Columbia, South Carolina 29202
I.D. #705

BY: /s/ Howard Hammer
HOWARD HAMMER, P.A.
I.D. #1695

Attorneys for Plaintiff

June 21, 1989

IN THE UNITED STATES DISTRICT COURT
COLUMBIA DIVISION OF SOUTH CAROLINA

N. G. Lewis,
Plaintiff,

vs.

Local No. 382, International Brotherhood of Electrical Workers (AFL-CIO), et al.,
Defendants.

Case No. 3:89-1361-01

MEMORANDUM IN SUPPORT
OF MOTION TO REMAND

This matter is before the Court on Plaintiff's Motion to Remand.

The Summons and Complaint in this action were filed in the Court of Common Pleas for Lexington County on April 24, 1989.

The Complaint alleges causes of action under the Right to Work Act of South Carolina, 1976 Code Section 41-7-10; that the Defendants wrongfully, willfully, wantonly and by outrageous conduct conspired to violate the exercise of Plaintiff's right to work, for which he seeks actual and punitive damage, not against any pension plan, or its administrator, but against the individual Defendants, for mental anguish, humiliation, emotional distress, the loss of future retirement benefits and the cost to purchase similar benefits.

ARGUMENT

THIS CASE SHOULD BE REMANDED BECAUSE THE COMPLAINT STATES CAUSES OF ACTION (VIOLATION OF SOUTH CAROLINA RIGHT TO WORK ACT, OUTRAGEOUS CONDUCT, CONSPIRACY) NOT UNDER ANY FEDERAL LAW, BUT RATHER SOLELY UNDER STATE LAWS, RIGHTS, OBLIGATIONS AND DUTIES FOR RESULTANT DAMAGES TO PLAINTIFF.

Defendants, in their Petition for Removal, claim that this is a suit for benefits under the federal Employee Retirement Income Security Act, (ERISA) 29 U.S.C. 1132, 1140, which preempts state law and thus permits removal to the federal court. This is not so.

Contrary to the claim of Defendants, this is not a suit to recover benefits under the terms of a plan or to clarify Plaintiff's rights under the term of a plan as provided by 29 U.S.C. 1132 (a)(1). Reference to the Complaint clearly shows that this action is brought under state law on three causes of action (violation of South Carolina Right to Work Act, 1976 Code Section 41-7-10 et seq., outrageous conduct, conspiracy) for damages allegedly caused by the willful, wanton and outrageous conduct of Defendants, who in violation of the South Carolina Right to Work Act, conspired to interfere with Plaintiff in the exercise of his right to work, resulting in termination of Plaintiff's membership in the union, and actual and punitive damages therefrom, consisting of mental anguish, humiliation, loss of future benefits and the cost of purchasing same, all in accordance with the authority of Layne v. Intern. Brotherhood of Electrical Workers, 271 S.C. 346, 247 S.E. 2d 346 (1978).

In support of Plaintiff's Motion to Remand, we call to the attention of the Court a similar case on point, Rody v.

Midland Enterprise, Inc., 688 F. Supp. 129 (1988), copy of opinion attached. There the District Judge, in an analogous factual situation, rejected Defendant's contention that Plaintiff's action was a claim under ERISA and in holding that the case should be remanded, reasoned that the suit was not preempted by ERISA because, as here, (1) the Complaint does not allege a violation of ERISA, (2) the allegations of the Complaint do not show that Defendants were motivated for the purpose of interfering with Plaintiff's rights under the plan; (3) the suit is not against the plan or its administrator, (4) the Plaintiff does not claim benefits under the plan or damages against the plan, but against the individual Defendant, and (5) the relationship of the suit to ERISA, if any, is too remote, tenuous and insubstantial to support jurisdiction for removal.

The rationale of the District Judge in Rody, applies with equal force to the facts in the present case. Here, as there, the Complaint does not allege a violation of ERISA; does not allege that Defendant's conduct was motivated for the purpose of interfering with Plaintiff's rights under a plan, as distinguished from interfering with the exercise of Plaintiff's right to work under the Right to Work Act of South Carolina; the suit is not against the plan or its administrator; the Plaintiff does not claim benefits under the plan or damages against the plan, but rather against the individual Defendants; and relationship of the suit to the plan, if any, is too remote, tenuous and insubstantial to support jurisdiction for removal.

Also, compare Kimbrell v. Jolog Sportswear, Inc., 239 S.C. 415, 123 S.E. 2d 524 (1962), in which the South Carolina Supreme Court, relying on decisions of the United States Supreme Court, pointed out that:

> "State jurisdiction, however, has not been preempted where the consequences of the conduct involved were of compelling State interest

> "The complaint is based upon an alleged criminal and tortious violation of the rights of the plaintiff for which the State law affords a remedy for the recovery of both actual and punitive damages. Where, as here, the tortious conduct is of compelling state interest affecting the public welfare and security of its citizens, the state remedy is not excluded by the National Labor Relations Act."

To the same effect is Gregory Electric Co. v. Custodes Construction Co., (1970, D.C.S.C.) 312 F. Supp. 30, relating to the South Carolina Right to Work Act.

Where, as here, the state action is only of peripheral concern, involves conduct in which the state has an overriding interest and is deeply rooted in local concern, and there is little risk that the state cause of action will interfere with the effective administration of federal labor policies, the state action is not preempted by the federal statute, Farmer v. United Broth. of C & J of America, Local 25, 430 U.S. 290, 97 S. Ct. 1056 (1977); United Const. Workers, etc. v. Laburnum Const. Corp., 347 U.S. 565, 74 S. Ct. 833 (1954).

In the alternative, should the Court determine that the Defendants' removal action was proper, the matter should still be remanded to state court in light of the facts that Plaintiff filed suit in state court and that the crucial and majority of issues necessary to determine the Defendants' liability in the suit involve state law questions. 29 U.S.C. 1132(a) provides that:

> (1) Except for actions under subsection (a)(1)(B) of this section, the District Courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the secretary or by a

participant, jurisdiction and District Courts of the United States shall have concurrent jurisdiction of actions under 29 U.S.C. 1132(a)(1)(B)."

29 U.S.C. 1132(a)(1)(B) provides that

"A civil action may be brought -

(1) by a participant or beneficiary -

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under terms of the plan, or to clarify his rights to future benefits under the terms of the plan;"

Thus, assuming, arguendo, that Plaintiff's suit is a claim under applicable ERISA statutes, then his claim under applicable ERISA statutes would appear to be a claim for benefits under the plan. As such the statutes provide for concurrent state and federal jurisdiction and Plaintiff's action is maintainable in state court. However, as set forth above, Plaintiff's Complaint does not make a claim for benefits due under the plan as none could be claimed under the plan because his membership in the union was terminated prior to his right to claim benefits under the plan.

CONCLUSION

For the foregoing reasons, in accordance with the facts and the applicable law, it is respectfully submitted that the cause should be remanded to the Court of Common Pleas for Lexington County.

Respectfully submitted,

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Attorneys for Plaintiff

Walter W. RODY

v.

MIDLAND ENTERPRISES, INC. and Port Allen Marine Services, Inc.

Civ. A. No. 88-151-A.

United States District Court, M.D. Louisiana.

May 6, 1988.

ENTERED: MAY 6, 1988

Former employee brought suit against former employer for wrongful discharge. After removal, former employee moved to remand. The District Court, John V. Parker, Chief Judge, held that claim was not a claim under Employee Retirement Security Act as to which district court would have had federal question jurisdiction, and could not be removed.

Motion granted.

Removal of Cases

Former employee's claim against former employer for wrongful discharge prior to fully vesting in retirement plan was not a claim under the Employee Retirement Income Security Act as to which federal district court would have had federal question jurisdiction, and could not be removed. 28 U.S.C.A. § 1331; Employee Retirement Income Security Act of 1974, §§ 502, 502(a), 510, 29 U.S.C.A. §§ 1132, 1132(a), 1140.

John Dale Powers, Powers, Vaughn & Clegg, Baton Rouge, La., for plaintiff.

Cornelius R. Hensel, S. Mark Klyza, Kullman, Inman, Bee & Downing, New Orleans, La., for defendants.

RULING ON MOTION TO REMAND

JOHN V. PARKER, Chief Judge.

This matter is before the court on plaintiff's motion to remand. Defendants have filed an opposition. There is no need for oral argument.

On December 30, 1987, plaintiff Walter W. Rody filed this action in the 19th Judicial District Court for the parish of East Baton Rouge, Louisiana, against Midland Enterprises, Inc. and Port Allen Marine Services, Inc., as his former employers. Plaintiff alleges that he became the Director of New Construction Marketing for Midland Enterprises on October 27, 1986, at which time Midland allegedly made a commitment to retain plaintiff until he would be fully vested in Midland's retirement plan on August 16, 1988. Plaintiff was allegedly terminated on January 17, 1987 because of a "conflict of interest" (i.e. solicitation of fleeting and mooring business on behalf of a corporation formed by Rody). Plaintiff seeks damages for wrongful discharge, including loss of salary and benefits.

On February 22, 1988, defendants Port Allen Marine and Midland Enterprises, Inc. removed this action, alleging they had been served on January 22 and 25, respectively. Defendants allege that plaintiff's claim for wrongful discharge prior to vesting in Midland's retirement plan necessarily constitutes a claim under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Sections 1132, 1140. Consequently, it is alleged that this court has jurisdiction pursuant to 28 U.S.C. Section 1331.

On March 28, 1988, plaintiff filed the motion to remand presently before the court. Plaintiff argues that his

claim does not constitute a claim under ERISA--that it is not a suit for benefits but one for damages for wrongful discharge.

In opposition to the motion to remand, defendants argue that plaintiff's allegations amount to a violation of Section 1140, which provides in pertinent part as follows:

> "It shall be unlawful for any person to discharge. . . a participant . . . for the purpose of interfering with the attainment of any right to which any such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act..."

Defendants further argue that plaintiffs claims fall within the civil enforcement provision of ERISA, 29 U.S.C. Section 1132(a) (empowering participants to sue for recovery of benefits), and are therefore preempted by ERISA and removable despite the fact that the preemption defense is not disclosed on the facts of plaintiff's petition. Defendants note that the Supreme Court recently excepted ERISA cases from the well-pleaded complaint rule in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. --- 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). See *Beers v. North American Van Lines, Inc.*, 836 F.2d 910, 913 n. 3 (5th Cir. 1988) (explaining the limited nature of this exception to the well-pleaded complaint rule).

Plaintiff correctly points out that defendants have misconstructed the lawsuit. Contrary to the argument of the defense, plaintiff has not alleged a violation of Section 1140 because the allegations relating to defendant's motivation in terminating plaintiff relate to "conflict of interest". There are no allegations which in any way indicate that plaintiff was discharged to prevent his benefits vesting under the retirement plan. Section 1140 clearly requires a "purpose of interfering with" the participant's rights under the plan. Such

improper motivation is not alleged here. See *Morningstar v. Meijer, Inc.*, 662 F.Supp. 555 (E.D.Mich.1987).

The court further agrees with plaintiff that this is not a suit for benefits under a retirement plan. See *Morningstar*, supra at 556-557. The only relationship that ERISA has to this action relates to plaintiff's claim for damages resulting from the loss of retirement benefits. Plaintiff does not claim benefits; he claims that a breach of his contract has denied him future benefits to which he would otherwise have become entitled. His claim for damages, as plaintiff points out, is not against the Plan, but against the employers who allegedly breached the contract. As noted in *Morningstar*, supra, damages will likely be measured by the cost to plaintiff to purchase substantially similar benefits to those lost by reason of the alleged breach. The court agrees with the rationale expressed by Judge Churchill in *Morningstar*, supra. This relationship is too remote, tenuous and insubstantial to support jurisdiction for removal.

Accordingly, the court hereby grants plaintiff's motion to remand and this action will be remanded to the 19th Judicial District for the Parish of East Baton Rouge, Louisiana.

IN THE UNITED STATES DISTRICT COURT
COLUMBIA DIVISION OF SOUTH CAROLINA

N. G. Lewis,
Plaintiff,

vs.

Local No. 382, International Brotherhood of Electrical Workers (AFL-CIO), et al.,
Defendants.

PETITION FOR REMOVAL

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE COLUMBIA DIVISION OF SOUTH CAROLINA.

The defendants herein respectfully show:

1. On the 24th day of April, 1989, an action was commenced against defendants in the Court of Common Pleas in the State of South Carolina in and for the County of Lexington, entitled N. G. Lewis, Plaintiff, against Local No. 381, International Brotherhood of Electrical Workers (AFL-CIO), Davis Self, Larry Poole, Jerome Jenkins, Doris M. Jones, Bill Davis, John C. Davis, and Ronald Goodale, Defendants, Docket No. 89-CP-32-1054 by the service upon defendants of a Summons and Complaint, copies of which are annexed hereto. The defendants were served with notice on May 1, 1989. No further proceedings have been had therein.

2. The above-described action is a Civil Action of which this Court has original jurisdiction under the provisions of Title 28, United States Code 1331, and is one which may be removed to this Court by the defendants

therein, pursuant to the provisions of Title 28, United States Code, Section 1441 in that:

The plaintiff was a member of the defendant Local Union in 1948 and remained a member until 1986, during which time the plaintiff paid dues out of which the Local set aside a certain amount into the Local Union Pension Plan. The plaintiff expected a pension therefrom upon his retirement. The plaintiff worked for a non-union contractor in violation of Union rules. Because of his actions and knowing violation of Union rules, the Union, as a disciplinary action, fined him. He refused to pay the fine or further dues, and he therefore lost his membership. The plaintiff alleges the defendants violated South Carolina's Right to Work Act, S.C. Code #41-7-10, et seq. (1976) and thereby brings this action in the Court of Common Pleas in the County of Lexington, South Carolina on April 24, 1989.

This Petition for Removal is first based on the fact that ERISA preempts the application of the South Carolina Right to Work Law. Section 514(a) of ERISA states that, except subject to express exceptions set forth in the statute:

> ... the provisions of this Subchapter [I 'Protection of Employee Benefit Rights,'] and Subchapter III ['Plan Termination Insurance'] shall supercede any and all State laws as they may now or hereafter relate to any employee benefit plan described in Section 1003(e) of this Title and not exempt under Section 1003(b) of this Title.

29 U.S.C. §1144(a)

As an employee benefit plan "established [and] maintained...by...[an] organization representing employees engaged in commerce or in any industry or activity affecting commerce", 29 U.S.C. §1003(a), the International Brotherhood of Electrical Workers Pension Fund comes within the ambit of the preemption section.

29 U.S.C. §1144(a) preempts State laws "as they may now or hereafter relate to" a benefit plan. The South Carolina Right to Work Law does not, by its terms, deal with or obviously "relate to" pension funds. However, Lewis' purpose in invoking it in this case is to bar the Union from using internal discipline to interfere with his pension rights. This "indirect" relationship brings the Right to Work Law under ERISA. The Supreme Court had made clear that the term "relate[s] to" was intended by Congress to be broadly read.

ERISA preempts the State Court action. Because the instant case is under ERISA, a Federal question is present. Nevertheless, the instant case also satisfies the ERISA exception for 28 U.S.C. §1331. In Metropolitan Life v. Taylor, 55 USLW 4468 (April 6, 1987), the Court created an exception to the general rule (the "well pleaded complaint" rule which is that unless the complaint itself raised issues of Federal law, a case is not removable to Federal Court under 28 U.S.C. §1331) for certain ERISA actions. To be removable based on a defense brought under ERISA, the case must satisfy two criteria: (1) the defense must assert that the State claims under which the case was brought are preempted by ERISA; and (2) the case must fall within the scope of Section 502(a)(1)(B), the Civil enforcement provision of the Act. Metropolitan Life, 55 USLW at 4469.

This case would clearly satisfy the criteria: First, the defendants hereby assert ERISA preempts the State law claim. Second, the case at bar falls within the scope of Section 502(a)(1)(B). 501(a)(1)(B) states that:

> A Civil Action may be brought...
>
> (1) by a participant or beneficiary...
>
> (B) to recover benefits due to him under the terms of his plan, to enforce

> his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

29 U.S.C. §1132(a)(1)(B)

Lewis is bringing this action as a wrongfully disciplined member of the International Brotherhood of Electrical Workers, purporting to be a "beneficiary" of the pension plan. Lewis, in claiming internal discipline cannot be used to interfere with his pension rights, is, in essence, seeking to "enforce his rights under the terms of the Plan or to clarify his rights to future benefits under the terms of the Plan." Therefore, the instant case is a case that "could have been brought" under Section 514(a)(1)(B), and again is removable.

WHEREFORE, defendants pray that the above action now pending against them in the Court of Common Pleas of South Carolina in and for the County of Lexington, be removed therefrom to this Court.

RESPECTFULLY SUBMITTED, this the 26th day of May, 1989.

/s/ Larry L. Eubanks
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South Carolina Bar No. 1923

IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON

N. G. Lewis,

Plaintiff,

vs.

Local No. 382, International Brotherhood of Electrical Workers (AFL-CIO), Davis Self, Larry Poole, Jerome Jenkins, Doris M. Jones, Bill Davis, John C. Davis and Ronald Goodale,

Defendants.

COMPLAINT

Plaintiff above named complaining of Defendant's alleges:

FOR A FIRST CAUSE OF ACTION

1. That Plaintiff is a resident and citizen of the State of South Carolina, County of Richland.

2. That the Defendant, Local No. 382, International Brotherhood of Electrical Workers (AFL-CIO), is an unincorporated association owning property and doing business in the County of Lexington.

3. That on information and belief, the Defendants, Davis Self, Larry Poole, Jerome Jenkins, Doris M. Jones, Bill Davis and John C. Davis are residents and citizens of the State of South Carolina, Counties of Lexington and Richland.

4. That Plaintiff became a member of Defendant local union in 1948 and remained a member until 1986, a period of over thirty-five (35) years during which time he paid dues and made contributions to said Defendant Local Union and to said Defendant's Local Union Pension Plan

with the expectation of drawing a pension upon his retirement.

5. That on or about February 16, 1987 and for some time prior thereto, the individual Defendants, acting individually and as agents of the Defendant Local No. 382, International Brotherhood of Electrical Workers Union, jointly and severally, in violation of the South Carolina's Right to Work Act, S.C. Code #47-7-10, et seq. (1976), attempted to and did interfere with Plaintiff's exercise of his right to work, and did, thereby cause him to lose his pension benefits.

6. That as a result and consequence of the aforementioned unlawful conduct of Defendants, jointly, severally or individually, Plaintiff has suffered a loss of his pension and has been otherwise damaged.

FOR A THE SECOND CAUSE OF ACTION

7. That the Plaintiff repeats and reiterates herein the allegations of paragraphs 1-6 as though incorporated verbatim herein.

8. That the aforesaid actions of the Defendants were reckless, willful, wanton, oppressive and constituted extreme and outrageous conduct, as the result of which the Plaintiff has suffered extreme emotional distress, nervousness, worry, loss of sleep and other emotional ills, all to his damage, and has been deprived of income and other benefits he would have had.

FOR A THE THIRD CAUSE OF ACTION

9. That the Plaintiff repeats and reiterates herein the allegations of paragraphs 1-8 as though incorporated verbatim herein.

10. That the Defendants, in violation of South Carolina's Right to Work Act, conspired jointly and severally, in combination and with each other, by force,

intimidation and threats, to deprive Plaintiff of the exercise of his right to work under the aforesaid act, as a result of which Plaintiff has suffered damages.

11. That by reason of the premises aforesaid, and as a direct result thereof, the Plaintiff has been and will be deprived of the benefit of the monies paid to Defendant Local Union over the years during which he was a member, he has suffered and will suffer extreme distress, humiliation, nervousness, loss of sleep and other emotional ills, and he has been otherwise damaged.

WHEREFORE, Plaintiff prays for judgment against the Defendants, jointly, severally and in the alternative, for actual damages in the sum of Five Hundred Thousand Dollars ($500,000.00) and punitive damages in such amount as may be fair, just, adequate and appropriate, and for attorney's fees together with the costs of this action.

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BY: /s/ Howard Hammer
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Attorneys for Plaintiff

April 18, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FEDERAL

U.S. Constitution, Article VI

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Amendment X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

Removal of Cases, 28 U.S.C. § 1447

28 U.S.C. § 1447 (c), as amended

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under § 1446 (a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the

removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447 (d)

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Labor Management Relations Act, as amended (LMRA), 29 U.S.C. § 185 (a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Labor Management Reporting and Disclosure Act (LMRDA), Subchapter II, 29 U.S.C. § 413

Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other

tribunal, or under the constitution and bylaws of any labor organization.

Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144 (a)

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATE

SOUTH CAROLINA RIGHT TO WORK ACT

S.C. Code Ann. § 41-7-70(1). Interference with right to work, compelling labor organization membership, picketing, and the like made unlawful.

> It shall be unlawful for any person, acting alone or in concert with one or more persons:
>
> (1) By force, intimidation, violence or threats thereof, or violent or insulting language, directed against the person or property, or any member of the family of any person (a) to interfere, or attempt to interfere, with such person in the exercise of his right to work, to pursue or engage in, any lawful vocation or business activity, to

> enter or leave any place of his employment, or to receive, ship or deliver materials, goods or services not prohibited by law or (b) to compel or attempt to compel any person to join, or support, or refrain from joining or supporting any labor organization; or

S.C. Code Ann. § 41-7-80. Penalties.

> Any employer, labor organization or other person whomsoever who shall violate any provision of this chapter shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by imprisonment for not less than ten nor more than thirty days or by a fine of not less than ten nor more than one thousand dollars or by both in the discretion of the court.

S.C. Code Ann. § 41-7-90. Remedy for violation of rights; relief which court may grant.

> Any person whose rights are adversely affected by any contract, agreement, assemblage or other act or thing done or threatened to be done and declared to be unlawful or prohibited by this chapter shall have the right to apply to any court having general equity jurisdiction for appropriate relief. The court, in any such proceeding, may grant and issue such restraining, and other, orders as may be appropriate, including an injunction restraining and enjoining the performance, continuance, maintenance or

commission of any such contract, agreement, assemblage, act or thing, and may determine and award, as justice may require, any actual damages, costs and attorneys' fees which have been sustained or incurred by any party to the action, and, in the discretion of the court or jury, punitive damages in addition to the actual damages. The provisions of this section are cumulative and are in addition to all other remedies now or hereafter provided by law.